UNITED NATIONS

A

General Assembly

Distr.
GENERAL

A/47/95
24 February 1992
ENGLISH
ORIGINAL: SPANISH

Forty-seventh session
Agenda item 132 of the preliminary list*

REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION

Note verbale dated 19 February 1992 from the Permanent Representative of Mexico to the United Nations addressed to the Secretary-General

The Permanent Representative of Mexico to the United Nations presents his compliments to the Secretary-General of the United Nations, and has the honour to transmit to him the enclosed document entitled "International responsibility of the State for wrongful acts (a historical and critical study)".

The Permanent Representative would be grateful if the annexed document could be circulated as a document of the General Assembly at its forty-seventh session under item 132 of the preliminary list.

---

* A/47/50.

92-08135 3419f (E) 220992 300992 011092

/...

MEXICO

REPORT OF THE INTERNATIONAL LAW COMMISSION ON
THE WORK OF ITS FORTY-FOURTH SESSION

INTERNATIONAL RESPONSIBILITY OF THE STATE FOR WRONGFUL ACTS
(A HISTORICAL AND CRITICAL STUDY)

At the end of the last century, or to be more precise in 1887, there were still authors of treatises on international law who denied in the strongest possible terms the principle of international responsibility of the State, believing it to be incompatible with the dogma of sovereignty. Funck-Brentano and Sorel stated this, quite openly, in the following terms:

> "In principle, States are responsible only to themselves. The idea of a mutual responsibility of States is contradictory to the idea of sovereignty ... States are the sole judges of their responsibility: it is always within their power to make the transition from the regime of law which is peace to the regime of force and necessity which is war. The responsibility of States is not distinct from the general censure of the law of nations." 1/

Despite the foregoing, and notwithstanding such an open advocacy of total absence of responsibility on the part of the State, the authors just cited do, with the good sense which is characteristic of the French nation, and which not without good reason is mentioned at the beginning of the Discourse on Method, devote some space in their treatise to the subject with which we are concerned, in the following form:

> "These are the principles [absence of responsibility], deriving from the very nature of States; but if States took these principles literally, they would be constantly at war. They have felt the need to temper in practice the extreme rigour of the effects of their sovereignty. No State has recognized that it has responsibility towards the rest, but all of them have reached the conclusion that in order to maintain peace and good understanding with one another, they needed in certain circumstances, out of mutual respect, to act as if they were responsible; thus customs designed to make peaceful reparation for breaches of law have been established." 2/

We crave the reader's indulgence for the relative length of these quotations (such as it is); the aim has been to show what was the dominant feeling in those days, around the turn of the century, with regard to the international responsibility of the State. It was, we may say, rather the innate sense of the comitas gentium, of international courtesy, which lent support to the feeling of shared mutual responsibility among the members of the civitas maxima.

Moreover, the postulates echoed by these authors resulted not from mere lack of judgement, but were rather the logical consequence of their having espoused, like the generality of authors at that time, the formula of Jean Bodin, the creator of the term if not of the concept, to the effect that sovereignty is the supreme power (summa potestas) exercised over citizens and subjects - through the instrumentality of the law, needless to say, but without being subject to any law, in line with the classic definition of sovereignty:

Summa in cives ac subditos legibusque soluta potestas.

Sovereignty, in short, was conceived of as one of the essential attributes of the modern State, which Jean Bodin himself defined as the lawful government of many families and the possessions that they have in common, with sovereign power:

> Recta plurium familiarum rerumque inter ipsas communium cum summa potestate gubernatio.

Under this concept of sovereignty as absolute and, what is more, untrammelled by any law whatsoever, there was clearly no place for any responsibility towards the injured party, either in domestic or in international forums. The old law of nations was little short of equivalent to the rules of a club; puro ius dispositivum, alongside which there were one or at most two rules of jus cogens: pacta sunt servanda and consuetudo est servanda, designed to cover, respectively, the law of treaties and customary law which up until today rank equally, to all appearances, in international law.

There was in short a need to go beyond Jean Bodin, but not in a forward direction (towards the position we occupy) but for the time being backwards from him, paradoxical as it may sound - for retrogression is in some cases progress when, rather than remaining on the surface, like reaction, it strikes at the root (this is what revolution does). Article 27 of the Mexican Constitution, primarily in the references to communal lands and petroleum, is an excellent example of this.

What we are trying to say, in short, to come straight to the point, is that in the Spanish school of the sixteenth century (many years prior to Jean Bodin's work), the State ruled by law in the sense in which we understand it today had already taken clear shape, as the subordination of the governor, as well as the governed, to the law. In his Relectio de potestate civili (today we should say "theory of the State"), Francisco de Vitoria states categorically the proposition that the civil laws are also binding on the lawmakers, and above all on kings (maxime reges), and that this is so even assuming that the law is the work of the king himself, as was generally the case in Europe, particularly on the continent, where with the exception of the Imperial Diet the Head of State was at the same time and in the fullest sense the Head of Government. Notwithstanding this, Vitoria does not abandon his position, but rather strengthens it with the following argument by analogy:

> "Laws enacted by the king have the same force as if they were enacted by the republic. But the laws enacted by the republic are binding on all, and consequently, even if they are enacted by the king, are binding on the king himself: ergo etiam si ferantur a rege, obligant ipsum regem." 3/

This is a perfect definition, let it be said in passing, and more for the sense than for the words, of the State ruled by law, a term which trips easily off the lips of politicians, but from the tip of their tongues and not from the bottom of their hearts.

Vitoria went on to say that, while it was the king who decided whether or not to promulgate a law, once it was promulgated, it was no longer the king's decision who should or should not be bound by it. "It was the same as in a covenant", the master added. "A covenant is freely entered into, but thereafter it is binding". Vitoria thus makes a barely discernible transition from the municipal to the international forum. This he does (or rather his pupils do) by writing the famous paragraph of the Relectio de potestate civili which sets forth the historic proposition that "the law of nations has not only the authority of a covenant or agreement between men but also the force of law, since, in the most important matters, the world as a whole (totus orbis) promulgates laws which are binding on every nation, because they issue from the authority of the world as a whole: neque licet uni regno nolle teneri jure gentium; est enim latum totius orbis auctoritate".

At the time those were prophetic words, but with the passage of the years, or rather of the centuries, they found their full realization in the peremptory norms set forth for the first time in the Vienna Convention on the Law of Treaties. The Spanish school of thought of the sixteenth century was repeatedly invoked by the delegation of Spain and may others, including that of Mexico, through its head, Mr. Eduardo Suarez. Or is not the Vitorian totus orbis patently clear in the terms used in article 53 of the Convention, namely, "the international community of States as a whole", "en su conjunto", "dans son ensemble", to define one of the key elements of the peremptory norms.

However idle it may appear at first sight, the evocation of the past, both remote and recent, has tended to show that it is within that philosophical context - that of peremptory norms - that the codification of the principles governing the international responsibility of the State, which should wholly or partly assume the character of jus cogens, must take place. This occurred in the case of the sea-bed in the United Nations Convention on the Law of the Sea, signed at Montego Bay, and we should even now be thinking of a similar selection which could be made on the topic under consideration.

If anyone should still doubt the connection between this topic and the return to our great classics, it would suffice to draw attention to the fact that, concomitantly with the glorification of Vitoria and the no less intensive glorification of Grotius during the third decade of our century, the 1920s marked the beginning, under the auspices of the League of Nations, no less, of the movement to codify the topic of the international responsibility of the State. In 1925, in fact, the civilized world prepared to commemorate the third centenary of the publication of the greatest work of Grotius, the De jure belli ac pacis, in which for the first time we find an outline of a systematic treatment of what would subsequently be referred to as international crimes (referred to as crimen by Grotius) as in the following text:

"But of the ways in which leaders of others participate in a crime (in crimen veniunt) two are most frequently encountered and require careful consideration: forbearance and acceptance." 4/

Patientia et receptus, said Grotius. The first, patientia, is the inertia of the ruler in the face of the commission of wrongful acts by its subjects. The second, receptus, occurs when the sovereign shelters and protects the guilty subject. Consequently, and in sum, the responsibility for the crime, the fault or culpa, as it was referred to at the time, could pass from the subject to the ruler: a subditis culpa in rectores transit. Thenceforth, those principles would never again be modified, however much Grotius, from all accounts, might have preferred the study of the vicarious responsibility of the State rather than its direct responsibility, that is to say, the responsibility contracted through the commission of positive acts by any of the three branches of government - executive, legislative and judicial powers. Thus was laid down the important principle that would thereafter govern the codification movement.

The movement just referred to was formally launched under the auspices of the League of Nations at the Conference for the Codification of International Law, held at The Hague from 13 March to 12 April 1930. Of the three committees among which the Conference divided its work, the Committee entrusted with the issue of concern to us discussed it in general terms, and dealt more specifically with the status and treatment of aliens resident in the national territory of a State. Owing perhaps to the lack of time, the committee failed to reach a consensus on these matters, although additional reasons for that failure were without doubt the parallel movement of the debate in the inter-American regional forum, specifically in the General Claims Commission between Mexico and the United States, and in an even broader forum, in the Sixth International Conference of American States, held at Havana in 1928. The insurmountable disagreement at those meetings on such fundamental issues as the status of aliens and the Calvo Clause had a clear impact on the Hague Conference, to the extent that the ad hoc committee considered it preferable not to submit to the Conference any formal draft, or even a conclusion on the question. Subsequently and until its dissolution, the League of Nations took no action in the field of codification of the international responsibility of the State.

When the subject was next taken up by the United Nations, the International Law Commission, at its seventh session (1955), appointed Dr. Francisco V. García Amador as Special Rapporteur on the topic of the international responsibility of the State.

Having embarked on his task, the Special Rapporteur, in his first report (A/CN.4/96), took up the debate on the distinction, which was unknown in customary law, between merely wrongful acts and acts that gave rise to international responsibility, taking account of the fact that at the conclusion of the War a new international criminal responsibility had emerged in the proceedings of the Nuremberg, Tokyo and Manila Tribunals.

In his second report (A/CN.4/106), submitted to the ILC in 1957, the Special Rapporteur stated that thenceforth he would no longer address the question of punishable acts imputable to a State as a consequence of individual criminal liability, since he seemed to consider that no future repetition was to be expected of the horrendous crimes of Nazism, the commission of which had given rise to the inter-allied courts of the post Second World War period. He also declared that he would not be dealing with such theories as "causality" and "fault" since, according to him, these were purely academic theories. Wishing to move on to more practical issues, the Special Rapporteur confined his report to the responsibility of the State for injuries caused in its territory to the person or property of aliens. This position was clearly the most expedient in view of the nationality of the Special Rapporteur, and the most attractive, no doubt, for Latin American jurists. For this very reason, however, it was unattractive to many jurists from other continents, who reproached (sic) the Special Rapporteur for having disregarded other aspects of the question that were more general and fundamental, and of much greater importance, as stated in the official records: "The Special Rapporteur was thus reproached for having disregarded other aspects of the question which were of much greater importance".

Apparently undaunted by these objections, the Special Rapporteur submitted to the Commission (1958) his third report (A.CN.4/111), in which, with his reformist zeal still undiminished, he introduced the novel concept of treating a private individual as a subject of international law, by authorizing him to bring on his own behalf an international claim, with legal priority even over the diplomatic intervention of the State of which the claimant is a national. Unfortunately, the time was not yet ripe for such a revolutionary proposal to gain support. Clearly, however, the García Amador draft was simply intended to remove the traditional grounds for objection by the United States to the Calvo Clause, whereby it assigned precedence to the decision of the United State Government over that of its subject who had renounced the diplomatic protection of his Government. For the former, on the other hand, what was involved was an original and irrenounceable right to protect its nationals in any circumstances and whatever their particular status in the State of residence. It was not a vicarious function in representation of the affected individual, as the Special Rapporteur wished to make it appear, for which he was reproached by the Commission because of clear departure of his proposal from the rule upheld in this matter by the International Court of Justice: "That was a clear departure from the rule upheld by the International Court of Justice, namely, that in exercising diplomatic protection, the State was relying on its own right, not that of the private individual who considers himself to have been injured".

With as little success as hitherto, because he had antagonized the great Powers and their supporters, the Special Rapporteur continued with his succeeding reports, up to the sixth and last in 1961. At that point, another Special Rapporteur could have been appointed, particularly since at the 1962 session of the International Law Commission, Dr. García Amador was no longer a member of the Commission. However, in view of the little or no success achieved up to that time, in that the Commission had not adopted a single one

of the articles proposed by the Special Rapporteur, it decided for the time being to initiate a broad debate to determine ex novo what would be the best course to follow.

Despite the unfortunate fate of the García Amador draft, its main thrust still had its defenders in the debate which followed the departure of its author. In the view of those supporters, if it was necessary to begin ex novo, since up to that time nothing had been achieved, that was no reason why the Commission should begin ex ovo, in other words by reformulating the general principles in the matter (wrongful act, imputation and injury) on which consensus had been reached. Instead, the best course of action would be to select a field that was truly ripe for codification, which was the principal task of the International Law Commission. From that point of view, there was no field as fertile as that of the international responsibility of a State arising from damage or injury to aliens, and not only in Latin America but also in the third world in general, as highlighted by what is known, incorrectly, as the Don Pacífico case.

Since the members of the Commission could not reach agreement on the designation of the new Special Rapporteur (whoever it was would necessarily have a preconceived ideology), it finally agreed to establish a subcommittee under the chairmanship of Roberto Ago, with its membership including jurists who need no recommendation other than their names, such as Jiménez de Aréchaga, Lachs, De Luna, Tunkin and Yasseen.

With hindsight, the best course would have been for the subcommittee, which was so well balanced in terms both of geographical areas and of the diversity of legal systems, to have been able to submit a common draft on the international convention to govern the international responsibility of a State. The Commission, however, and rightly so in view of its heterogeneous composition, felt that it would be impossible to arrive at a common draft, and in the end decided to appoint Mr. Roberto Ago as the new Special Rapporteur.

We could at this point enter immediately into an analysis of the Ago draft, but as any critical examination of the draft must necessarily be based on a prior theory of the international responsibility of the State, we consider it preferable, before proceeding further, to present a brief outline of the general principles underlying the subject as a whole, together with our own views.

General principles governing the international responsibility of the State

If for any reason the legal order is breached, the person to whom the breach is imputable, by action or omission, must respond by appropriate reparation or is, in other words, responsible (from respondere) for his action or omission. This proposition, as a direct corollary of the idea of justice, does not require demonstration. "The basis of the reciprocal responsibilities of States", says Bonfils, "consists in the need to ensure respect for legal principles among the members of the international community, which itself constitutes the basis of international law". 5/

It is obviously an idea that holds good not only for the law of nations but for legal systems in general, as pointed out by the Permanent Court of International Justice in Chorzów factory case. "It is a principle of international law", said the Court, "and even a general conception of law, that any breach of an engagement involves an obligation to make reparation".

In what we take to be the general view, nemine discrepante (or almost nobody), the following three factors play a key role in the establishment of international responsibility:

(1) An action or omission that violates an obligation established by a norm of positive international law and in force between the agent State and the wronged State;

(2) Attribution of the illegal act to a specific State;

(3) Definite loss or damage incurred as a result of the aforesaid behaviour. Damnum emergens, lucrum cessans is the usual legal expression, to which may possibly be added purely moral damage, for example to the honour of the State.

"The whole of this discourse is coded", to be sure, but a great deal still remains to be decoded. There is always general agreement on first principles, but as soon as we move beyond them difficulties begin to arise. As the philosophers say, it is the passage from the apophantic to the aporetic.

The question of fault

It is the first question we come up against, since there are some commentators (including no less a person than Grotius) who claim that a subjective factor, the fault (positive malice or negligence) of the agent whose conduct may be attributable to the State, must be added to the three components of international responsibility listed above.

In other words, the point at issue is whether international responsibility depends on a particular animus underlying the conduct of the State, or on the mere existence of the action or omission that violates international law. But legal theory and judicial practice still fluctuate between the two extremes, with the added complication that language itself may be conducive to ambivalence that tends to obscure the problem. In French, for example, faute does not imply fault but simply denotes the commission of a wrongful act. The same applies to the term falta in Spanish. Hence the saying "I committed this error (falta) but without intent - and therein lies the fault (culpa)". In other cases, moving from commission to omission, a State's negligence in not having certain laws and an efficient system of law enforcement is interpreted as fault, when in reality it is merely an infringement of the legal norm of due diligence which, as is generally recognized, the State should observe in such cases. In thus contrasting negligence and diligence, there are therefore no grounds for treating the former as an essentially subjective state of mind: it is simply as the actual violation of an objective norm.

To simplify matters, the best course would seemingly be to dismiss the notion of fault altogether, although it still weighs heavily in Hugo Grotius's theory of authority, a concept that he introduced into our discipline. He maintains that it is contrary to the law of nations to hold the ruler responsible for the acts of his agents in the absence of fault on his part: "Ut vero sine culpa sua ex ministrorum facto quisquam teneatur, nonesse iuris genium". 6/

Grotius's reasoning was correct, but it inevitably reflected the political ideology of his time, according to which everything gravitated towards the person of the monarch. L'Etat c'est moi was the generally accepted principle of government, and not only for those who had the sincerity to proclaim it. Under these circumstances, the will of the king was really and truly the will of the State, a situation unheard of today, even - needless to say - in the remaining constitutional monarchies. In Hans Kelsen's view, to talk about the will of the State in a modern State, giving to the word "will" all the psychological significance with which it is normally inbued, is simply a contradiction in terms. As Kelsen sees it, what is called the will of the State is simply the mundane expression of the law in the form of decrees, judgements or administrative acts. But with the disappearance from political theory of the concept of the will of the State, the concept of fault directly attributable to the State as such also automatically loses its validity.

However, matters are not so simple as to allow us to cast off the Grotian heritage completely. There actually are cases or situations in which the norm of international law refers directly to the subjectivity of the agent State, as when, for example, in connection with denial of justice, reference is made to the malicious application of the law to the detriment of aliens or with intent (will) to injure them in some way. This clearly takes us into the field of fault theory, which is furthermore unavoidable on account of our involvement with the legal concept of denial of justice. And there may be many other similar cases in which the culpable or fraudulent conduct of the organs of a State is latent in the objective norm. We find this even today, albeit in another context (which we cite as very recent evidence of the same way of thinking), in the Vienna Convention on the law of treaties, article 49 of which introduces fraud as a cause of invalidity of international treaties, describing it in terms of a State having been induced to conclude a treaty by the fraudulent conduct (conduite frauduleuse) of another negotiating State. Needless to say, the fraudulent conduct is that of the negotiators themselves, but the Convention attributes it directly to the State. As may be gathered, psychological or anthropological metaphors have clearly not been banished from the general theory of the State.

Practically speaking, the best way of obtaining guidance in the difficult task of distinguishing between the two situations is to follow the wise advice of the lawyer Dionisio Anzilotti, our illustrious patron, in the Clipperton Island case. According to Anzilotti, "Where a norm stipulates that the State shall bear international responsibility for specific acts, it has to be ascertained whether the norm, explicitly or implicitly, by virtue of its

meaning or spirit, makes the attribution of responsibility subject to fault or fraud, or whether, on the contrary, it merely refers to the existence of an act objectively contravening international law". 7/

In view of its clear relevance to our argument, we feel it may be interesting to refer to the Chattin case (1927) discussed in the United States-Mexico General Claims Commission, the decision concerning which stated, inter alia, that in order to establish correctly that there has been denial of justice by an organ of the judiciary, it must first be ascertained whether the treatment of the alien in question involved acts such as outrage, bad faith, wilful neglect of duty, or insufficiency of governmental action of such flagrancy as to be apparent to any impartial man. 8/

If one disregards these cases, in which, as we have said, the subjective, culpable or wilful element is an integral part of the objective norm, there is no doubt that it would be best to abandon completely the old Roman-law tradition, which in this instance does not meet the practical requirements of the contemporary international community. For example, what need is there to refer to culpa in eligendo or culpa in custodiendo in connection with the State's duty to have an adequate security apparatus and to ensure that it is functioning effectively? The State's negligence in such a case is again something that can be determined objectively, without there being any reason to attribute fault to it in what is simply an omission of duty.

As for the opinion of United States jurists, which is of obvious interest to us, Edwin Borchard, the leading theoretician in the United States on the question of the international responsibility of the State took the view that "the failure to perform a duty should suffice, without a further attempt to prove a vague and uncertain fault". If we are determined at all costs to adhere to the concept of fault, out of a love for tradition or for whatever reason, we could espouse the definition of a writer whose greatest merit is that he appeals to everyone, namely Paul Fauchille: "Ultimately, 'fault' should be understood to mean anything that one does without having the right to do it, and anything that one omits to do when one ought to have done it". This pure and simple equation between fault and the breach of a legal precept takes us into a sea of confusion, into the night when all cats are grey, to quote Cervantes.

As we bid farewell to the theory of fault, we can say that it offers a good example of the impermanence of juridical concepts, each one of which is eventually superseded by one or more concepts more in keeping with the new era. In its day, the theory of fault performed an invaluable service when Grotius used it to replace the barbaric (not to say "savage") Germanic theory of tribal solidarity, according to which all the members of an ethnic group were jointly responsible for an offence committed by a single member, and as a result of which the vengeance of the enemy tribe fell on the heads of the entire group. Grotius countered that barbaric principle with the civilized principle, derived from Roman law, of the innocence of members of the group other than the criminal, with whom the leader would share responsibility only if he had been in a position to prevent the crime but had failed to take

preventive measures, or if he had been remiss in punishing the offender (patientia et receptus). Having fulfilled its historical mission, the theory of fault, as García Amador noted, is today solely of academic interest, inasmuch as the same result could be achieved through either the subjective or the objective system, as a number of jurists have argued (Accioly, Le Fur and others).

Abuse of a right

The situation, then, is that with or without fault, as the case may be, the breach of a norm of positive international law by one State to the detriment of another automatically engenders the responsibility of the first State in relation to the second.

There can of course be no objection to the above proposition, which is as solid as a rock, but we are immediately confronted with the inevitable difficulty of establishing the theoretical truth of that proposition. Will there not be cases in which the injury caused to a third State is obvious, but neither the legal norm authorizing it nor the norm prohibiting it is visible with total clarity? The only way to give a favourable welcome to these doubtful or twilight cases is apparently to have recourse to juridical concepts in the best cases, and to the hypothesis of the abuse of a right in the worst cases. Hence, Paul Reuter, one of the writers most ardently advocating the new concept, makes a distinction between wrongful and unlawful acts. From this perspective, all unlawful acts would be wrongful, whereas not all wrongful acts would be unlawful. The latter group would apparently include acts involving the abuse of a right, which in Paul Reuter's insightful view are acts that fail to take into account the "teleological elements" implicit in the juridical norm. 9/ Reuter concludes with the comment that "current international law does not appear to exclude the abuse of a right, even though juridical practice offers very few examples". This is an excellent appraisal, which we shall now proceed to document.

Not even in civil law, let alone international law, has there to date been free and unqualified acceptance of the legal concept known as the abuse of a right. It has nothing to do with Roman legislation, where abuti applies only to the disposal of an item, but is a modern creation derived from French judicial practice. The first specific case seems to date back to 1855, when the Colmar Court of Appeal ordered a landowner to demolish a false chimney which he had constructed on his property for the sole purpose of depriving his neighbour of light. In the preamble to the judgement, we find the following justification for the operative part:

> "Although in principle the right of ownership is to some extent absolute in that it authorizes the owner to use and abuse what belongs to him, as with any other right, the exercise of the right of ownership must be limited to the protection of a serious and legitimate interest. The principles of morality and equity do not permit the law to countenance an action inspired by malice, carried out under an evil impulse, not justified by any usefulness to anyone, and causing serious harm to another person."

Although there then followed a number of judgements along the lines of the judgement concerning the "mur haineux", until the beginning of the present century, judicial practice had not outweighed the school of thought that was generally reluctant to abandon the policy of unconditional respect for private ownership. Marcel Planiol, the greatest civil-law expert of the era, placed on record his rejection of the concept of the abuse of a right in this monumental opinion:

> "This new doctrine is based entirely on language insufficiently studied; its formula 'abusive use of rights' is a logomachy, for if I use my right, my act is licit; and when it is illicit, it is because I exceed my right and act without right ... One must not be misled by the use of words: the right ceases where the abuse commences, and there cannot be an 'abusive use' of a right of whatever sort, because of the irrefutable reason that one and the same act cannot at the same time be in conformity to law and contrary to law." 10/

The right ceases where the abuse commences ... As might have been expected, this inflamed the opposition, and perhaps what both sides lacked - Planiol and his detractors - was a finer understanding of flux and dialectics that would have permitted them to reconcile the conflicting positions into a higher synthesis. There is indeed a point in time when a right is still a right as it begins to be exceeded, and another point when it ceases to be a right as it degenerates into absolutely intolerable excess. Those are the terms in which we should view this new concept, which appears to find supreme literary expression in the character of Shylock.

Planiol's mistake, it seems to me, was to rely exclusively on article 544 of the Napoleonic Code - according to which ownership is the right to enjoy and dispose of property in the most absolute manner - instead of going back to that article's antecedents, including the legislation, judicial practice and legal doctrine of Rome. In that vast repository of documents, he would first have found the comprehensive definition of ownership: jus utendi, fruendi et abutendi, quatenus ratio patitur. In other words, the use, enjoyment and disposal of property must be reasonable, as we would say today. In the very definition of jus proprietatis, therefore, we find the prohibition of the abuse of that right. This means that continuing or increasing abuse eventually extinguishes the right. Such a fluid or dynamic view of rights - so much more appealing to us - is what was missing from the old school of exegesis (from Planiol to Anzilotti), for which there had to be a clear-cut division between the presence and the absence of a right (Recht und Unrecht, in Kelsen's terminology), instead of a flux between extremes and a fusion of opposites.

Returning to Rome, we find in the Digest a case quite similar to that adjudicated by the Colmar court: a landowner who by digging a well on his own property deprives his neighbour of water. In determining whether or not to clear the landowner, the praetor makes a perfectly lucid distinction in his judgement between two possibilities: the possibility that the landowner acted solely in order to cause harm to his neighbour (cum animo vicino nocendi), or,

on the other hand, the possibility that he acted in order to make his field more productive (ut agrum suum meliorem faciendum). In sum, this case is altogether similar to that of the "mur haineux" or "mur de chicane", or "Neidmauer", to use the German legal term.

In conjunction with Roman judicial practice, there are the reflections of the philosophers, and the most authoritative voice in this process of synthesis is the great voice of Cicero, the incomparable jurist and philosopher, who gave us the famous maxim: summum jus summa injuria. In other words, exercising a right to the extreme may on occasion lead to the utmost injustice. This is the locus classicus and the oldest formulation of the concept of abuse of a right. The best translation was the one which Voltaire gave us centuries later in his wonderful line: "Un droit poussé trop loin devient une injustice".

The concept which we are considering has to date had changing fortunes, both in municipal law and in international law. As regards municipal law, apart from certain provisions scattered through various codes which implicitly reflect the principle, the only text, as far as we know, which formally, ipsis verbis enunciates the principle is article 2 of the Swiss Civil Code:

> "Every person is bound to exercise his rights and fulfil his obligations according to the principles of good faith.
>
> The law does not sanction the evident abuse of a man's rights."

As is all too obvious, this precept is more to be admired than to be imitated, and it is hardly conceivable in a supercivilized country such as the Swiss Confederation. Where else could one justify this unlimited confidence in the wisdom and integrity of the judiciary, at whose discretion the principle is to be applied? And even in that country, there has been no shortage of civil-law experts voicing the fear that the article, on account of the unlimited discretionary powers conferred on the judge, might become an all-purpose instrument, or, as the Swiss say for a maid of all work, "une bonne à tout faire" or "ein Mädchen für alles".

When we turn from municipal to international law, we note that the doctrine of abuse of a right has slowly been ploughing through the obstacles in its path. The old hidebound school of Planiol and Anzilotti still carries much weight. As far as they are concerned, "it is possible in international law to establish with absolute certainty the principle that responsibility does not derive from the excessive exercise of a right, but from an action against the law". 11/

Faithful to his teacher Anzilotti, or not daring to dissent from him, Roberto Ago clearly showed his reluctance to introduce the doctrine of the abuse of rights into the field of international law. In opposition to the Greek jurist, Nicolás Politis, an enthusiastic advocate of the doctrine in question, Ago expounded his views in the following paragraphs:

> "Following a patient study of international doctrine and practice, meticulous and thorough critique has demonstrated, through a comparative examination of the legal orders of States in this area, the impossibility of allowing acts, ad aemulationem to be regarded as wrongful acts under positive international law. Despite some ambiguous expressions in the jurisprudence of the former Permanent Court of International Justice, it has been impossible to demonstrate the existence in international practice of a principle concerning the prohibition of the abuse of rights; likewise, it is more than doubtful that such a prohibition would have the value of a general principle of law recognized by civilized nations, under the terms of Article 38 of the Statute of the International Court of Justice, since, as has been amply shown, there are many legal orders of States which do not recognize the concept of abuse of rights." 12/

Without for the time being, entering into a detailed discussion of the above considerations, about which there would be much to say, we believe that we are correct in stating that, in our view, the Italian jurist did not, in this instance, attach sufficient value to the jurisprudence of the former Permanent Court, the only one in existence when Ago taught his course at The Hague (1939). In both the Chorzów Factory case and the Upper Savoy Free Zones case, the Court spoke in these very terms of the abuse of right, an expression which is in no way ambiguous, as Ago says it is; moreover, he could have updated his course at The Hague by mentioning the jurisprudence of the International Court of Justice. Indeed, in the Fisheries (United Kingdom v. Norway) case, the Court, in adjudicating the right of the coastal State to delimit its territorial waters by drawing straight baselines, characterized as a patent abuse of that right the drawing of such lines where they clearly depart from the general direction of the coastline - a frequent occurrence, moreover, and one which supports and strengthens the introduction into international jurisprudence of the principle of the abuse of rights.

Accordingly, it was not because of any romantic influence - rather, we had our feet firmly on the ground - that, at the Third United Nations Conference on the Law of the Sea, the Mexican delegation introduced the text which was later to become article 300 of the Montego Bay Convention:

> "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right."

In proposing this text to the Conference, we were motivated mainly by finding that the principle of good faith embodied in the Charter of the United Nations (Article 2, paragraph 2) in the same terms which we later transferred verbatim, to the Convention; the reason why we related this principle to the principle of the abuse of rights (of its prohibition, of course) was that we noted this symbiosis in article 2 of the Swiss Civil Code, where, in fact, the prohibition of the abuse of rights is merely the counterpart of good faith. And given the need to include a similar provision in the Convention on the Law

of the Sea, the basic consideration was that, as the "rights, jurisdiction and freedoms" embodied in that Convention were interwoven and overlapped with one another in every respect (even on a dreary island in the middle of the ocean!), it was futile to attempt to polish the innumerable definitions further and that, in the final analysis, the best thing would be to leave these questions to good faith and its logical counterpart, the prohibition of abuse of rights. Jorge Castañeda, Minister for Foreign Affairs and Head of the Mexican delegation, personally coordinated these negotiations.

To the extent to which it is possible to attach some value to doctrine and jurisprudence, it is to be hoped that a positive assessment of the principle of the abuse of rights can be preserved in all legal spheres, and especially in that of State responsibility. The Mexican delegation can perhaps be accused of having prematurely introduced the principle, which is not yet incorporated in other legislation. This may be so - we do not deny it - but it should not be forgotten that, from the contemporary perspective, the boundaries between the progressive development and the codification of international law have a tendency to become blurred. If this were not so codification would be a more or less purely mechanical operation, or, at best, a grammatical exercise consisting of restating in properly drafted articles, in a code, in short, what is already well established in doctrine and international custom. Lastly, the theory of the abuse of rights can be very useful to us, developing countries, because of our need to confront continually the abuses of the great Powers, including the abuse of rights. The doctrine in question might perhaps, for example, help us to strengthen our traditional defence of the Calvo clause, since even if, we were to take for granted that an individual's waiver of the diplomatic protection offered by his government cannot invalidate the latter's right to protect him _velis nolis_, even on that assumption, once again, the instances in which the claim of diplomatic protection has led directly to the use of force are well known.

Circumstances precluding responsibility

Having reached this point, the authors pause to consider briefly the circumstances precluding responsibility which here, as in any legal order, in criminal law, for example, can be invoked by a State to release it from international responsibility.

Although held by some authors to a greater extent and by others to a lesser extent, the common view, to which we adhere, is that we could reduce the aforesaid circumstances to the following four: consent, _force majeure_, self-defence and state of necessity.

The first two can be dispensed with easily because they are immediately obvious. Indeed, it is a universal principle of law that no injury is caused to one who knows and consents: _scienti et consentienti non fit injuria_. Foreign troops can freely patrol the entire national territory, but if it has been so agreed between the parties, as in the infamous MacLane-Ocampo treaty, there will be no grounds for complaint.

Equally obvious is force majeure, which English speakers also call an act of God, since the form in which it is best known is that of major natural disasters. An act of God or an act of men - such as an uprising in which a crowd's anger is unleashed (mob violence), making it impossible for the State to maintain towards aliens even the minimal courtesies required of it in normal times, such as expediting the administration of justice.

The concept of force majeure implicitly encompasses the fortuitous events, since even though it does not so clearly embody the element of violence, what is also at issue is an external, unforeseeable event completely outside the control of the State, which finds it impossible under such [words missing in original] normal circumstances, would have entailed its responsibility. In view of such a close similarity, we did not deem it necessary to include a separate section on force majeure among the circumstances precluding wrongfulness in an act of the State.

Another problem relating to force majeure is that of determining whether an uprising or a civil war would be a circumstance involving it; on that assumption, if this comparison were justified, the State against which such attacks were directed would be released from all international responsibility. We will return to this point when we consider the Ago draft articles adopted by the International Law Commission.

Self-defence

Here, too there is no ground for the least objection, since it is also one of the surest and oldest principles of law, faithfully reflected in Roman law, that it is lawful to repel force with force: vim vi repellere licet.

A lucid and clear text if there ever was one - but one that has given rise to innumerable difficulties (such is law - and there is little we can do about it), the main one being to determine at what point self-defence can take place - whether only after, or even before, the use of force by the aggressor; the solution to this problem would obviously differ according to whether we are considering the situation before or after the regime established by the Charter of the United Nations.

Before the Charter regime, the legal opinion of States always favoured the inherent right (the Charter itself recognizes it as such) of self-defence, which was believed to exist at all times, whether it was tacit or explicit. When the question arose in the international context because of the inexplicable silence which the Briand-Kellogg Treaty maintained on this point, F. B. Kellogg, in his dual role as Secretary of State and signatory of the Treaty, hastened to reassure the public in a speech which reads, inter alia, as follows:

> "There is nothing in the American draft of an antiwar treaty which restricts or impairs in any way the right of self-defense. That right is inherent in every sovereign State and it is implied in every treaty."

The final point to which we should give some emphasis, in view of what is said below concerning the pre-Charter regime, has to do with whether self-defence can take place not only after but before, or in other words, whether the concept would include not only the measures to be taken following an attack, but also pre-emptive measures. The general doctrine was based on the concept that whoever is capable of the maximum is capable of the minimum (in majori minus inest), so that if, at that time, the sovereign State was the supreme arbiter of peace and war, it must be all the more powerful in respect of a lesser matter, such as the exercise of the right of self-defence. Having this outlook, States in general accepted the doctrine of pre-emptive self-defence expounded by Daniel Webster in the Caroline case, which would apply if we were faced with an attack that was "instant, overwhelming, leaving no choice of means and no moment for deliberation".

What remained of all this in the San Francisco Charter?

Incredible as it may seem today to anyone who was not alive in those days, there was no self-defence clause in the scheme of the future organization until the preparation of the Dumbarton Oaks Proposals. Bound hand and foot, we were delivered into the hands of the omnipotent Security Council (on paper, of course), with its Military Staff Committee and its armed forces (Articles 43 to 47 of the Charter), which would safeguard every aspect of our health and well-being. However, foreseeing (and so early!) the hollowness of such rhetoric, the Latin American delegations, and they were not alone, demanded the inclusion in the Charter of an explicit self-defence clause, which was later to become Article 51:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

Whenever the subject of self-defence is mentioned or touched upon, however tangentially, in an international instrument, it is customary to refer to Article 51, which is slavishly reproduced, without abbreviation or commentary. This is undoubtedly the safest approach; however if we follow that route, there will be no way of ever discussing the two enormous difficulties in the said Article, as follows:

The first problem is whether the text of the Article should specify that the armed attack must be unprovoked since otherwise the real aggressor would apparently be the State which provokes the attack. Attempts have been made to solve this problem by comparison with the French text, which does not mention an attack but rather aggression (agression armée), the implication being that what is involved is an unprovoked attack.

The second difficulty, and surely the more serious one, is determining the point at which self-defence can be initiated: when the armed attack has already been carried out, when it is at least under way, or clearly prior to it - post factum, in fieri, ante factum, to use the terms of ancient law. Now, on the third hypothesis, we would have the doctrine formulated in the Caroline case - neither more nor less - and the problem arose, as it was bound to, with regard to nuclear weapons, because of the interval of time which elapsed between the signing of the San Francisco Charter and the explosion at Hiroshima. What was said then is all too obvious, namely, that as the State which was the target of the nuclear attack could no longer defend itself in turn in any way, a pre-emptive defence would be justified in a similar case, and the reason why nothing was said about this in the Charter was that its drafters had not been able to foresee the new situation.

So long as none of this has been clarified in any of the principal organs of the United Nations (nothing less would be required in a matter of such gravity), it would perhaps be best to leave things as they are and to confine oneself to citing Article 51 where appropriate, directly and word for word.

State of necessity

We should have preferred to avoid this topic (an abacaxí [pineapple], as the Brazilians say, because it is prickly on all sides), but since it appears as a circumstance precluding responsibility in the Ago draft and with the approval, furthermore, of the International Law Commission, we have no choice but to tackle it as best we can.

As a rule, the Italian school, first Anzilotti and then Ago, did not hesitate to give the stamp of approval to the state of necessity (Notstand) in the international legal order. First of all, let us see what Anzilotti has to say:

> "What are we to understand by a state of necessity, which is capable of releasing the State from the fulfilment of a duty imposed by international law? For our part, we believe that we have sufficiently characterized this concept by relating it to the idea of the preservation of the State. It is not the danger to or the sacrifice of such and such interests, however important they may be, which can excuse the State from fulfilling the obligations imposed on it by the law of nations ... The fulfilment of an international duty should not be abandoned except to the extent that it endangers the very existence of the State, because in this case, what is at stake is no longer a mere conflict of interests; rather, a more compelling argument comes into play, the meaning of which is necessarily implied in any obligation entered into by a State. Moreover, with regard to determining the situations in which a threat to the existence of the State does or does not exist, this is a question of fact which cannot be resolved through abstract principles." 13/

Faithful to the position of this teacher Anzilotti, Roberto Ago in turn defines his own as follows:

"In positive international law, the state of necessity is strictly limited to situations in which there is really an imminent and serious threat to the very existence of the State, which is not caused by that State and which cannot be averted by any other means." 14/

The above statements are, of course, unobjectionable, since no State, like no individual, can be required to commit suicide, which would be the equivalent of not putting up any resistance to a situation which implies the disappearance of the State in question. However, if we examine matters more closely, we will realize that what we have here is an a priori construction which has no support in personal experience, let alone in historical experience.

In the imagination - but fortunately, up to now, not in reality - there could be a situation (and we cannot conceive of any other) in which the airspace of a State is invaded by a swarm of nuclear missiles which must inevitably, at one blow, wipe out its major population, industrial and cultural centres, instantly returning it, as we might say, to a state of nature. Once again, this would be the only imaginable instance, under current circumstances, of the physical disappearance of a State, the one situation in which there are no restrictions on the legitimate use of force in case of necessity: Notstand, Notwehr, as the creators of this legal concept put it. In all the other instances recorded in history, the imperialist spirit or, on the most benevolent assumption, a military victory, is clearly visible behind the legal contrivances, but never the very existence of the State which has claimed to be in a state of necessity. In order to illustrate this briefly, we will give the floor to one of the greatest authorities on the subject, Paul Fauchille, who writes as follows:

"In our view, the so-called right of necessity should be rejected, since it would excuse the worst injustices, the most horrendous violations of the equality and independence of States. It is an expedient concocted by some politicians in an attempt to legitimize usurpations and arbitrary acts. If we should accept it, we could henceforth no longer speak of real international law. History, moreover, contains many instances in which the theory of necessity was applied. In the name of necessity (sic), the three partitions of Poland between Prussia, Russia and Austria took place; the latter subsequently invoked the same principle in order to justify annexing Venice to the Empire. The destruction of the Danish fleet in the port of Copenhagen (1801) by British vessels, and the bombardment of the city (1807) by those same British, were presented by Great Britain as acts justified by the right of necessity, and even the système copartageant availed itself of this pretext in order to approve (1846) the incorporation into the Austro-Hungarian Empire of the free city of Kraków, the last surviving remnant of the Polish State." 15/

Thereafter Fauchille dwells at somewhat greater length, quite naturally, on the more celebrated case of invocation of the state of necessity by a major Power, namely the violation of the neutrality of Belgium and Luxembourg (August 1914) by the passage of German troops through their territory to enter France. It was then, the story goes, that the German Chancellor apparently uttered the two sayings for which he is remembered only too well: the first, that international treaties are mere scraps of paper (chiffons de papier) and the second, that necessity knows no law, a dictum which comes to us, so it is said, from Roman law: necessitas caret lege. However that may be, what Bethmann-Hollweg meant, and in fact said, was that if the German army had not acted as it did, French troops would not have been slow to penetrate German territory, and Germany would have begun to lose the war from the outset.

It is of course perfectly possible that Bethmann-Hollweg sincerely believed what he said and that he was justified in his assessment of the situation, but what he failed to perceive was that the end of military victory does not provide across-the-board justification for all means, up to and including trampling on the right of neutrals. These are extremely elastic concepts, and once the door is opened to them there is no limit. Chancellor Bethmann-Hollweg was succeeded, as the years passed, by Chancellor Hitler who, seeing military victory as synonymous with political domination, first in Europe and then world wide, was not satisfied, like his predecessor, with temporary military occupation of foreign territory, but felt a need for the perpetual, and in Western Europe more or less lenient enslavement of entire peoples.

We will close this speculative preamble on a high note by citing the prince of the internationalists, all of them from the American continent, the incomparable Hildebrando Accioly, from whom the following paragraphs are taken:

> "Nor is the so-called state of necessity propounded by some authors, principally German, a circumstance which cancels out State responsibility. In general terms, this situation is one of conflict between a State's proper or vital interests and the rights of another State or States. It does not involve, as in the case of self-defence or reprisals, a reaction against an unjust act, but simply self-centred action by a State against the rights of another State or States.
>
> "The proponents of the theory of necessity came to base it on the State's right of self-preservation, but they forget that this right is not, and cannot be, absolute: there can be no right in opposition to a right. The right of one State is limited by the rights of the other members of the international community." 16/

Following the above schematic outline of the fundamental concepts in this field, we can now go on without further preamble to examine and comment on the articles of the Ago draft, approved in first reading by the International Law Commission at its thirty-first session (1979), at which the Commission also, in view of Mr. Ago's election as a Judge of the International Court of Justice, designated Mr. Willem Riphagen as the new Special Rapporteur.

One further remark before going into the articles in detail. In view of the enormous breadth and complexity of the subject, Professor Ago confined his work, firstly, to the norms governing the responsibility of the State "in general", without touching on any specific sector, as the García Amador draft had done, and, secondly, to internationally wrongful acts, leaving completely out of the discussion the responsibility that may arise from perfectly lawful acts which entail high risk to the environment or to neighbouring States. In our view, and perhaps in order to relieve himself of this burden once and for all, the Special Rapporteur went too far in separating the two types of international responsibility, as in the following passage from his third report:

> "Being obliged to assume the possible risks arising from the exercise of a lawful activity and being obliged to face the consequences ... of the breach of a legal obligation are not comparable situations. It is only because of the relative poverty of legal language that the same term is habitually used to designate both."

This is going too far, once again, in that the common element is the concept of responsibility in the one case ex culpa or ex delicto, and in the other arising from the State's role as the insurer of high-risk works or enterprises. With this similarity, nevertheless, we are certainly entering a completely new normative area, one which corresponds to the increasingly intense industrial activity of the modern State.

On the basis above all of such important documents as the Stockholm Declaration (1972) on the protection of the environment, Professor Gunther Handl has asserted that there already exists a norm of international customary law to the effect that all States are responsible for damage caused extraterritorially by activities conducted under their jurisdiction or control. Once embarked upon this course, we find the old questions of the former concept of responsibility arising again here when Handl asks if, in relation to this new type of responsibility, we shall have to be guided by the principle of strict liability or whether, on the other hand, in addition to harm, the element of fault or negligence (liability for fault) will be called for in order that a State may be held liable for its ultra-hazardous activities in offshore (Ixtoc) or transfrontier installations.

The field opened up in this way for consideration by the man of science and the jurist is a fascinating one, and it has of course not been neglected by the United Nations. As we understand it, although without having been able to refer directly to the relevant material, the International Law Commission established a working group, which since 1978 has been operating under the chairmanship of Professor Quentin-Baxter as Special Rapporteur, responsible for the topic of "International liability for injurious consequences arising out of acts not prohibited by international law".

Without further ado, let us proceed directly to chapter I of the Ago draft, entitled "General principles", which begins as follows:

Article 1. Responsibility of a State for its internationally wrongful acts

"Every internationally wrongful act of a State entails the international responsibility of that State."

Before going further, and while reserving the substantive discussion until later, because we believe this to be an article of prior and special significance, as we say in procedural law, it will be appropriate to raise at this juncture, on beginning our reading of the text, the terminological question of ascertaining, to the extent possible, why instead of acto, which would have been the normal term, the word hecho was preferred to connote the unlawful conduct of the State under international law. Why was this done when, in the language closest to our own, Portuguese, the incomparable Accioly always speaks of ato, never of fato, in his lengthy analysis of the international responsibility of the State?

Why should not the same thing have happened in Spanish, which yields little to Portuguese in terms of its proximity to the parent tongue of both, Latin? In this latter language, blind facts of nature are always facta, but human conduct is referred to, again always, by the terms actus. Actus licitus, actus illicitus, but never factum licitum, factum illicitum. Why should not these expressions have passed into Spanish in its pristine state, as they passed into Portuguese?

Oddly enough, in languages that are much farther from Latin than our own, the invariable word is akt in German and act in English: internationally wrongful act, in the relevant texts of the ILC draft.

According to what is said in the Special Rapporteur's third report (para. 45), agreement was reached solely with the French-speaking members of the Commission (the Spanish-speaking and Portuguese-speaking members were apparently a quantité négligeable), and among them it was agreed that fait would be better than acte, as covering both actions and omissions in breach of the juridical norm. That may well be, but if we have any pretensions to linguistic rigour, nor does hecho appear to be a term very accommodative of omission or inaction, in that someone who does nothing is ipso facto not performing any act. And if we look into the matter a little further, we shall have to agree that acto perfectly covers omission or inaction as well, in that, in order for it to be punishable, it must necessarily emanate from a decision of the will (not to pay what I owe, for example, an eminently positive act if ever there was one).

Lastly, and supplementing on this point the report of the Special Rapporteur, among the Spanish-speaking members of the Commission voices were raised in disagreement, such as that of Mr. Alcívar (Ecuador) in whose view there was no reason to align the Spanish with the French text, as the Special Rapporteur was requesting, in that in Spanish the illicit acto, whether of commission or omission, "consisted in human conduct which was objectively contrary to law" (summary record of the 1080th meeting, 30 June 1970). In short, if some day we come to the codification conference, a review of this point would be desirable.

Having disposed of the linguistic issue, and returning now to article 1 of the draft, reproduced above, the only comment we have to make is that the statement: "Every internationally wrongful act of a State entails the international responsibility of that State" inexplicably omits the element of injury or harm caused to another State by the violation of the juridical rule. Nevertheless, the general concept of responsibility necessarily entails the concept of responsibility towards someone, whoever it may be, and it can only be the person harmed by the breach of the rule. The need for this element, the element of injury, is still reiterated by the most recent authors of whom we are aware, among them Alfred Verdross, for whom "a subject of international law who infringes a norm of international law, whether common or specific, is responsible towards the subject who sustains harm". 17/ Otherwise, no one would be able to protest the breach of the norm unless he felt affected in some way, in accordance with the old principle of procedural law pas d'intéret pas d'action. Injury, moreover, as we have said elsewhere, is not necessarily material injury: moral injury is sufficient - an affront to the flag, for example, and countless other instances. According to custom, reparation for the injury to the flag has to be made in the form of a 21-gun salute.

There are cases, we are only too well aware, in which the breach of the rule affects not only one State in particular, but the international community of States as a whole, particularly in cases of piracy or genocide, in which an actio popularis would lie against the perpetrators of such crimes.

Another example is that of crimes against humanity, as they were designated at the inter-allied tribunals at Nuremberg, Tokyo and Manila - using, incidentally, terminology that had been in existence for quite some time: pirates were always known as enemies of the human race (hostes humani generis), and accordingly any civilized Government could capture and execute them.

With the exception of these monstrous cases of direct outrage to the whole of mankind, in all the rest, those that happen in the daily course of life, there must always be a plaintiff in order for us to be able to speak of international responsibility. Let us, therefore, include the element of injury, be it purely moral, to the affected State out of respect for the aptness of the concept in its pristine form, from which the first to depart, to our knowledge, was our Special Rapporteur.

In his view (as he expressly states) the element of injury appears only in connection with injury caused to an alien in or by the State of residence. What an incredibly short-sighted attitude, to say the least!

In the last course he gave at The Hague, and in strong opposition to Roberto Ago, Eduardo Jiménez de Aréchaga left us a record of his thinking in the following form:

> "This is not, in my view, a sufficient explanation. The question arose very clearly in the Nuclear Tests cases. For the purposes of the discussion, let us assume that the carrying out of nuclear tests in the

atmosphere constitutes a violation of the Nuclear Test Ban Treaty and of customary rules developed on that basis through General Assembly resolutions. Yet, to succeed in their claim against France, Australia and New Zealand had to show that the fall-out from the French tests caused damage to their population and their territory. In other words: a certain conduct is forbidden and therefore becomes unlawful because it is likely to cause damage to other subjects; however, State A only becomes responsible towards State B if, as a result of the unlawful conduct of A, B suffers damage.

"This shows that the failure to fulfil an international obligation is a necessary, but not a sufficient element in the case of international delicts. In order to create the automatic link of responsibility between the acting and the claiming State an additional condition is required: damage suffered by the claimant State." 18/

Article 2. Possibility that every State may be held to have committed an internationally wrongful act

"Every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility."

Unless this be a mere platitude, in that there is no reason to predicate the applicability of a dictum de omni to anyone in particular, the only apparent reason for introducing this provision is that given by the International Law Commission (in the report on the work of its twenty-fifth session, 1973) to the effect that the aim was to ensure that a State should not escape its international responsibility by claiming that the relevant rules do not apply to it. And nevertheless, this was precisely the case of the former protectorates, which were represented in international relations by the protecting State, and it is still, unless some change has taken place very recently, the situation of the so-called "Free Associate State" of Puerto Rico, a misnomer which but poorly conceals the existence of a true protectorate, that of the North American Union. From all that I have been able to read, no member of the Commission seems to have raised the problem, no doubt out of some inexplicable shyness. Nor - far from it! - has there been any reference to the case of Byelorussia and the Ukraine which for all that they are Members of the United Nations are represented in bilateral diplomacy, to date at least, by the Soviet Union.

What has on the other hand been discussed, per longum et latum, is the situation of federated states within the federal State. In this respect, a certain consensus appears to have prevailed to the effect that representation abroad should be the responsibility of the federal Government and not of the local governments, and note has been taken in particular of the Swiss formula, whereby the international responsibility of the federal State is of the same order and extent as that of the unitary State. Swiss constitutional law permits the Confederation to assume, at the international level, responsibility for acts imputable to the cantons which are contrary to the law of nations.

The amendment that might perhaps be introduced into the current ILC text would be to refer to "sovereign State" instead of simply "State", in order to dispel to the extent possible any confusion in this respect, since even today, as we have seen, States of inferior standing still exist.

Article 3. Elements of an internationally wrongful act of a State

"There is an internationally wrongful act of a State when:

"(a) Conduct consisting of an action or omission is attributable to the State under international law; and

"(b) That conduct constitutes a breach of an international obligation of the State."

This article enunciates in their proper order, for further development at length in subsequent articles, the subjective element and the objective element of the normative complex of the international responsibility of the State, and for the time being no further comment is called for, in that the relevant doctrine has been sufficiently expounded elsewhere.

Article 4. Characterization of an act of a State as internationally wrongful

"An act of a State may only be characterized as internationally wrongful by international law. Such characterization cannot be affected by the characterization of the same act as lawful by internal law."

This article expresses the basic line of thought by which both the Special Rapporteur and the Commission were guided, the Triepel-Anzilotti line, based on a clear duality between internal law and international law - Landesrecht und Völkerrecht, in the title of Triepel's famous work. For all the forms of osmosis and symbiosis that may exist between them, each legal order has its own canons and its own legality, fully independent of the other. The classic expresson of this is to be found in the famous ruling of the former Permanent International Court of Justice in the Chorzów factory case, to the effect that:

"From the standpoint of International law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures."

All the many efforts made to date to merge the two orders into a single order have proved vain and illusory: the only result has been confusion. Bergson's aphorism l'idée du désordre et des deux ordres loses in translation the obvious play on words in the original, but the idea is that confusing two orders leads only to disorder. One of them is the judicial order created by the individual will of the State, as the primary constituent power, and the other, very different from it, is the one which, as Grotius said in defining the law of nations, derives its binding force from the will of all or many: quod omnium aut multorum voluntate vim obligandi accepit.

Accordingly, on the firm basis of the dualism between the two orders, the dreams once inspired in us by Hans Kelsen's presentation of national law as a "delegation" of international law - a monist construction without the slightest basis in history, which records large and powerful States among whom nevertheless an international community as we understand it and know it today was for centuries non-existent - are definitively relegated to the realm of dreams. Let us turn the page and pass on.

Article 5. Attribution to the State of the conduct of its organs

> "For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question."

This does not, as has sometimes been wrongly stated, constitute any referral of international law back to internal law, but simply the need of the State making the complaint to determine accurately whether it has to deal with an act attributable to the offending State, for which purpose it perforce needs to look at the administrative organization of the latter State. There is no confusion between the two judicial orders referred to above: each of them maintains its autonomy intact.

Once again, this clause states a truism, and the only real addition is to be found in the last line of the article, under the terms of which, for the responsibility of the offending State to be incurred, it suffices that the State organ in question should have acted in the capacity attributed to it under internal law, and that in addition this action should have exceeded its competence. This had to be stated in these terms, or at least left understood (as in this instance it is partly stated and partly left understood), in order to invalidate the doctrine which for some time met with a certain degree of acceptance, to the effect that the conduct of an official who has exceeded his competence is not, strictly speaking, an act of the State, which accordingly is exempt from any responsibility. More appropriately, it would seem, in the interests of international security, it later came to be considered that it would be best to attribute to the State conduct of an official in the above circumstances, whether within or outside his competence, on condition that he was acting in that capacity, which is, in short, what the article says.

Article 6. The relevance of the position of the organ in the organization of the State

> "The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and whether it holds a superior or a subordinate position in the organization of the State."

> "The State is responsible for its organs, for its organs only and for all its organs." (Jiménez de Aréchaga)

This article is of great importance, and deserves the closest attention. Literally, in attributing to all organs of the State the capacity to entail its responsibility, the article is as clear as it is devoid of meaning, in that what was expected of the Special Rapporteur was not that he should repeat empty formulas, but that he should give them some content in order to shed light on the future through the codification process. With respect to the legislative power, for example, he could have told us from what moment or under what circumstances a law of a State can be challenged in the internationnal forum, or with respect to the judicial power, the centre of the most serious questions of all, he could have presented us with a more or less plausible outline of denegatio justitiae instead of casting us off to float on the infinite flood of interpretations among whose range of possibilities the denial of justice has these many years been adrift. Unless this gap is filled, to a greater or lesser extent, at the future codification conference, the article as it stands will be able to render little or no service in the countless controversies which will certainly continue to arise in practice.

Most important of all, however, is the inclusion of the constituent power in the list of State powers to which responsibility is attributed, with the further addition of the parastatals and even the extrastatals dealt with in subsequent articles.

In the field of pure logic, where Professor Ago appears to have been operating, there can be no objection, if international law is felt to be inherently superior to internal law, or even to be a part of it, in accordance with the old Anglo-Saxon dictum "International law is a part of the law of the land".

It would appear that nothing further is required - except for the fact that reality, and above all human reality, does not always run in these convenient, commodious geometrical channels of logic invented by jurists. At the apex of Kelsen's Stufenbau was to be found, according to its author, and with a truly sublime "immediacy" (Unmittelbarkeit), was to be found, we repeat, international law, a set of norms which imparted their rhythmic motion to the normative state order, like the interlocking parts of a clock - Kelsen's pendulum, as it were - while he was speaking to us about the other order. Nevertheless, the only thing that was and has always been at the summit of the Stufenbau was the law of revolution, the only law of all that is absolutely sovereign and which none the less was never recognized in legal text prior to General Assembly resolution 1514 (XV) and succeeding resolutions - and revolution finds expression in the constitutional juridical order which emanates from it, and of which there can be no judge or arbiter other than the people in arms.

Article 7. Attribution to the State of the conduct of other entities empowered to exercise elements of the governmental authority

> "1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question."

This apparently refers, although not explicitly so, to parastatal enterprises or other juridically similar entities which, while not commercial in purpose, are in some way associated with the activity of the State. To such entities, then, the article extends the provision of article 5, that their conduct, even if it may have been ultra vires, engages the responsibility of the State, on condition that they acted in the capacity of official or unofficial representatives of the State.

Article 8. Attribution to the State of the conduct of persons acting in fact on behalf of the State

> "The conduct of a person or group of persons shall also be considered as an act of the State under international law if:
>
> "(a) It is established that such person or group of persons was in fact acting on behalf of that State; or
>
> "(b) Such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority."

This time, and it would have been better to say so openly, the subject is clearly acts of individuals (fonctionnaires de fait, as Roberto Ago calls them) whose services may be peremptorily called on by the Government of the country in emergency situations. In the war-time context this has been extremely common, as for example during the blitz (1940-1941) when the British Government called on civilians to cooperate and assist in rescuing and providing first aid for victims of the enemy bombing.

These have not been the only instances, however, and Professor Ago aptly cites the case of Adolf Eichmann, snatched on a Buenos Aires street by agents of the Israeli Government who sent him to Jerusalem to answer for his crimes there. On grounds of the violation of Argentinian territorial sovereignty constituted by those acts, the Security Council requested the Government of Israel to make appropriate reparation to the Argentine Government.

Article 9. Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization

> "The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed."

With respect to the explanations of the Special Rapporteur, we are dealing here not with operations which the organs of a State may carry out in foreign territory (the United States Army or Navy, for example, in the countless military bases which the United States has throughout the world) but

a real loan of organs and their appropriate personnel ("transferred servants") which one State makes to another in order to ensure the performance of a public service which the recipient State is not properly equipped to provide. The loaned contingent thus becomes a full part of that State's staff and consequently the State using such personnel assumes responsibility for the latter's conduct. We are talking, of course, of principle, since the legal status will be entirely different if for example, the recipient State is forced to receive a foreign military contingent without ever having requested it.

The service and the personnel responsible for performing the service may also be provided by an international organization, although which one is not specifically stated, but the situation envisaged was the use of military force under the auspices of the United Nations, and under a wide range of modalities, certainly, in the operational aspect.

The leading case, the one which started it all, was, as we all know, the Korean War (1950). In taking responsibility for it, the Government of the United States claimed to be doing so on behalf of the United Nations, but it soon became quite clear that the operation as a whole and the operations from start to finish had been directed by the unified command in the hands of the United States high command. What is more, in the end Washington itself provided the funds needed to make amends for the damage caused by its troops in a number of territories (USSR, the People's Republic of China and the People's Republic of Korea) although the money in question was given to the Secretary-General of the United Nations.

In the case of the Congo operation (1961), on the other hand, the legal situation was very different. United Nations forces operating in that territory, although made up of national contingents, were always placed under the authority of a commander appointed directly by the United Nations and all operational orders were received directly from the Organization. At least, that was the case until the Secretary-General's sad demise at Nairobi airport.

In order to distinguish clearly between the two situations (the Congo and Korea) and between any which may arise in the future, and also in order to avoid any confusion between voluntary loan of contingents and imposed loan, it might be best to stick strictly to the Ago draft (subsequently modified by the International Law Commission) which stated that organs placed at the disposal of another State should be "actually under the authority of the State at whose disposal they have been placed and [should] act in accordance with its instructions".

Article 10. Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity

> "The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity."

This article merely drives home what has been stated in earlier articles concerning the attribution to the State, for purposes of its responsibility, also of the actions of its officials outside their duties; the only new element being that it includes, for the same purposes, even actions which are clearly contrary to the orders received by the official.

Quite honestly, there was no need to repeat this so many times, since the opposite, traditional view, which was upheld by Guerrero, Chairman of the committee of experts of the League of Nations, at the Codification Conference of 1930, was defeated there by Hackworth, who introduced the new terminology which prevails to this day, namely, that henceforth we should not be guided by the real competence but rather by the apparent competence of the State organ; everyone, including the representatives of our countries, the representatives of the Spanish-American community, has followed this line. It was said that that was best because it was clearer and safer in international relations; however, no one seems to have fully realized that meanwhile the investing country has the advantage, for which any poor devil in these countries where corruption and an easygoing attitude are the norm can be used as the perfect pretext for shifting the responsibility to the country of investment. Through this chain of incompetent or venal officials, the investor holds the authorities of the country of investment in his hands.

In the draft article which we have just reviewed, the Special Rapporteur had included one exception whereby the State would be absolved of all responsibility if the incompetence of its alleged agent was manifest to all. The Commission evidently did not accept this safeguard, more is the pity, since by so doing it would have helped reduce the number of claims prompted by the excesses or greed of mere nuisances who clearly do not represent any authority. The Commission's rejection was all the more puzzling in that it is not in perfect accord with the parallel text we have in article 46 of the Vienna Convention on the Law of Treaties, which states as follows:

> "1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> "2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."

Perhaps what the Commission may have feared (and this is pure conjecture) is that the exception we have mentioned would have somewhat broken the rigid dualism of the article in question, according to which the decision as to whether or not certain acts are attributed to the State as a subject of international law is completely autonomous and therefore quite independent from the decision as to whether or not these same acts are attributed to the State as a subject of internal law. In any event, it is worth pondering on the matter with a view to the forthcoming codification conference.

Article 11. Conduct of persons not acting on behalf of the State

"1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.

"2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that of the persons or groups of persons referred to in that paragraph and which is to be considered as an act of the State by virtue of articles 5 to 10."

This article which is so obvious and so clear - at least as far as the first paragraph is concerned - is simply a statement of the modern principle that the acts of individuals cannot, in and of themselves, be considered acts of the State. The principle, which as we saw was formulated by Grotius, reflects the reaction of Roman civilization to the inately savage Germanic principle that the entire group must answer for the crime of one individual; the German Government applied this principle quite recently - less than 50 years ago - to the 300 Italians whose bodies lie in the Ardeatine tombs of Rome.

Vattel, who came after Grotius and before ourselves and who for over a century was the most widely heeded jurist in Europe and America, introduced the doctrine of complicity formulated as follows:

If the nation or its leader condones and ratifies the act of its subject, it makes the act its own (elle en fait sa propre affaire) and the injured party must therefore look to the nation as the true author of the injury, considering the citizen as merely the instrument. 19/

Needless to say, Vattel's condonation and ratification was equivalent to Grotius' patentia and receptus, which was going too far, at least in most cases, although in some well-known cases, such as the crime of Sarajevo, the support and consent - tacit at least - of the Bosnian authorities is a matter of historical record, and we all know what the motive was.

However this may be, the Grotius-Vattel doctrine remained in force as recently as the famous Janes case, which was heard by the United States - Mexican General Claims Commission established pursuant to the Convention drafted at the "Bucareli" Conference. On behalf of the widow of an engineer named Janes, who was murdered by an employee whom he had dismissed, the United States agent, invoking the Vattel doctrine, accused the Mexican Government of complicity, alleging that it had "condoned and ratified the wrongful act, thereby making the act its own". This is, word for word, the language used by Vattel.

However, the Commission, presided over by the great Dutch jurist, Cornelius van Vollenhoven, flatly rejected the theory of complicity, condonation and ratification on the part of the Government and found the latter guilty only of having been somewhat remiss in apprehending and

punishing the offender. This admirable judgement was the basis for the new doctrine on the subject and it is therefore useful to transcribe the following paragraph:

> "A reasoning based on presumed complicity may have some sound foundation in cases of nonprevention where a Government knows of an intended injurious crime, might have averted it, but for some reason constituting its liability did not do so. The present case is different; it is one nonrepression. Nobody contends either that the Mexican Government might have prevented the murder of Janes, or that it acted in any other form of connivance with the murderer. The international delinquency in this case is one of its own specific type, separate from the private delinquency of the culprit. The culprit is liable for having killed or murdered an American national; the Government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender. The culprit has transgressed the penal code of his country; the State ... has transgressed a provision of international law as to State duties ... Even if the non-punishment were conceived as some kind of approval - which in the Commission's view is doubtful - still approving of a crime has never been deemed identical with being an accomplice to that crime."

It seems so obvious, so simple, but no one until then (this was in 1925) had said it with such clarity. The normative dualism between the internal legal order and the international legal order, each of them supremely autonomous in its own sphere, was now irrevocably consummated. The action of individuals is simply the element which catalyses the wrongfulness of the act of the State within its own normative order. To make this clear through what is possibly the most modern and the best commentary on the article under discussion, we turn once again to Jiménez de Arechaga:

> "This theory of State complicity was adopted in several arbitral awards of the nineteenth century and by important writers on the subject.
>
> "It is, however, evident today that the notion of implied State complicity does not provide an adequate explanation. Complicity between the offender and the State obviously does not exist in the usual case of failure to prevent or to punish the act, but only in the exceptional case where the authorities actually know of the intended act beforehand, or themselves instigate it. According to modern arbitral awards and to the replies of governments at the 1930 Conference, the State is only responsible for the acts of its own organs, when they have failed to exercise due diligence in the prevention or the repression of the crime committed by the individual. The basis of State responsibility in these cases is not complicity with the perpetrator but failure to perform its own international duty of taking all reasonable and adequate measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the offender. There is no reason then to speak of State complicity or of 'vicarious' or 'indirect' responsibility, since the State is internationally responsible, not for the acts of any private

individual, but for its own omission, for the lack of 'due diligence' of its organs. The delinquency of private individuals is merely the occasion for calling into operation certain duties incumbent upon the State. The State is only responsible when it 'has failed to take such measures as in the circumstances should normally have been taken to prevent, redress or inflict punishment for the acts causing the damage'. And this duty of 'due diligence' must take into consideration the means available to each State. It has been characterized by Max Huber as a '_diligentia quam in suis_'; in other words, the same degree of vigilance and protection normally given to nationals." 20/

Article 12. Conduct of organs of another State

"1. The conduct of an organ of a State acting in that capacity, which takes place in the territory of another State or in any other territory under its jurisdiction, shall not be considered as an act of the latter State under international law.

"2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that referred to in that paragraph and which is to be considered as an act of that State by virtue of articles 5 to 10."

On reading the above, we would instinctively think of _occupatio bellica_, of occupation forces under the former law of war, but as all of that, at least on paper, has passed into history by virtue of Article 2, paragraph 4, of the United Nations Charter, we should now have to think of the _occupatio pacifica_ by NATO forces, primarily those of the United States of America, which extends throughout the world. We shall not err in aligning ourselves with this hypothesis, in that it is exactly what induced the Special Rapporteur to recount to us the case from which he drew his inspiration for the article under discussion. His account may be paraphrased as follows.

On 6 February 1956, the Government of the Soviet Union addressed a protest note to the Government of the Federal Republic of Germany complaining that the United States armed forces stationed in Germany had launched from the territory of the Federal Republic certain balloons equipped with automatic cameras and radio transmitters, which had been intercepted in Soviet air space. We shall not go into the details of the dispute, which ended peacefully, although not to the satisfaction of the parties, for various reasons which clearly stem from the dispute between them. What remains, nevertheless, as an ideological residue of the controversy is that alongside the responsibility of the occupation forces there is also the responsibility of the host State for permitting such wrongful acts to take place in its territory. Yet the article we are discussing makes absolutely no reference to this responsibility. García Amador, on the other hand, had provided for it in his draft, in the following form:

"Acts and omissions of a third State or of an international organization shall be imputable to the State in whose territory they were committed only if the latter could have avoided the injurious act and did not exercise such diligence as was possible in the circumstances."

The last phrase is extremely well balanced: although the host State is under the heel of the powerful, it nevertheless continues to exercise its territorial sovereignty, and may perhaps do something to avoid its territory being used as a springboard for aggression.

Article 13. Conduct of organs of an international organization

"The conduct of an organ of an international organization acting in that capacity shall not be considered as an act of a State under international law by reason only of the fact that such conduct has taken place in the territory of that State or in any other territory under its jurisdiction."

As it has not been possible to find in the reports of the Special Rapporteur an indication of what specific situation or situations the article may refer to (the service of the Blue Helmets in various territories might be one of them), and since the text before us is so clear and obvious, it would appear that we can let it pass without further comment.

Article 14. Conduct of organs of an insurrectional movement

"1. The conduct of an organ of an insurrectional movement which is established in the territory of a State or in any other territory under its administration, shall not be considered as an act of that State under international law.

"2. Paragraph 1 is without prejudice to the attribution to a State of any other conduct which is related to that of the organ of the insurrectional movement and which is to be considered as an act of that State by virtue of articles 5 to 10.

"3. Similarly, paragraph 1 is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law."

In the first paragraph, it seems that it would have been better to add, after the word "administration", "and which is not under its control", or something similar, to the effect that the insurrectional movement must be totally removed from the control of the State in order for the latter to be totally exempt from international responsibility. There are situations, indeed, such as a coup d'état (apparently not dealt with in the Ago draft), in which, by virtue of their disowning of the constitution in force up until that time, those who remain in power are in the incongruous position of appearing to be rebels against themselves.

Leaving in parentheses, then, the case of the coup d'etat, which merits very particular study in the context of State responsibility, paragraph 1 of the article under discussion deserves nothing but applause for its embodiment of the victory of a principle of justice which was not always as obvious to everyone. There was a time, indeed, at which on the basis of the theory of risk or insurance (the State as insurer), the Institute of International Law, between 1898 and 1900, tried to sell the idea of an objective guarantee which would have to be assumed by the State for all damage caused to foreigners in the course of insurrections or civil wars. Fortunately, this strange doctrine never succeeded in prospering, and the one embodied in the article we are commenting on had long been well attested to in international jurisprudence. Let us cite just a couple of the most relevant cases.

In the Home Insurance Company case, decided on 31 March 1926 in the General Claims Commission between Mexico and the United States of America, that body cited earlier arbitral awards upholding the "well-established principle of international law that no government can be held responsible for the act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrection".

This doctrine dated in fact from much further back, and in the same words, as expressed in 1868 by Secretary of State Seward as a guide to the conduct the Government of the United States proposed to follow in its relations with other countries.

Borchard, for his part, that era's supreme authority on responsibility, placed on record the following:

> "the doctrine which has now received general support is that on principle the state is not responsible for the injuries sustained by aliens at the hand of insurgents in civil war unless there is proven fault or a want of due diligence on the part of the authorities in preventing the injury or in suppressing the revolution." 21/

The same author clarifies that the granting of an amnesty to rebels does not mean that the lawful government accepts any responsibility for their acts, a case in point being, in the United States, the granting of amnesty to the Confederates once the war was over. 22/

Where the third paragraph of the article under discussion is concerned, it might at first sight, but subject always to direct consultation of the documents, be taken to refer to recognition of insurgency or belligerence, institutions which, while they have not been formally abolished, are obsolete in modern international law.

Article 15. Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State

"1. The act of an insurrectional movement which becomes the new government of a State shall be considered as an act of that State. However, such attribution shall be without prejudice to the attribution to that State of conduct which would have been previously considered as an act of the State by virtue of articles 5 to 10.

"2. The act of an insurrectional movement whose action results in the formation of a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered as an act of the new State."

The first paragraph of this article relates to the commonest case, namely ex post facto attribution to the new government resulting from a victorious revolution of the acts, both lawful and unlawful, of the rebel leaders now in power.

This is a principle which is generally accepted by doctrine and international jurisprudence, above all in the regional sphere. In the case of the Bolívar Railway Company, heard by the Joint Claims Commission between Venezuela and the United Kingdom of Great Britain and Northern Ireland, the umpire Plumley stated the principle in the following form:

"The nation is responsible for the obligations of a successful revolution from its beginning, because ... it represented ab initio a changing national will, crystallizing in the finally successful result."

There was no real need to reinforce the principle by the somewhat metaphysical point made in the last phrase, for while the national will is more or less readily apparent in time of peace, through the press or the legislative bodies, in a revolution, on the other hand, what decides its final fate is purely and simply force of arms, and in the end there is no possibility of knowing who embodies the national will, the victor or the vanquished.

From this article onwards the draft of the Special Rapporteur, and subsequently of the Commission, enters upon a second phase, characterized by regulation of the objective element in the international responsibility of the State, that is to say the law described by the same term, the objective law which the State has to violate (the subjective element) in order to give rise, through the joint effect of both elements, the subjective and the objective, to the juridical concept of the international responsibility of the State.

Article 16. Existence of a breach of an international obligation

"There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation."

The article as drafted is a perfect example of redundancy in legal language. As it stands, it is an analytic judgement, one of those in which what is predicated is already implied in the subject of the predication, to use Kant's definition. The concept of breach (in law, that is) already includes that of non-conformity of the act with the rule, so that the article is, to put it plainly, saying the same thing twice.

To the above may be added, and this is still more important, the fact of defining the objective element of responsibility as the breach of an obligation. The "breach" part is fine, but the second part is bad, indeed very bad, in that it runs counter to the whole western juridical tradition. Under Roman law an obligation is a subjective element on the part of the obligee, of the person having that status as a result of the objective rule, and it is this latter to which juridical texts should above all refer. This is made perfectly clear by the classical definition found in title XIII (De obligationibus) of the Institutions of the Emperor Justinian:

> "An obligation is a bond under law by which we are compelled to make a payment in conformity with the civil law."

An obligation is thus a bond under law (vinculum juris) deriving precisely from the fact that both the creditor and the debtor are subject to the law of the city, secundum nostrae civitatis jura. The creditor's right against the debtor and the latter's corresponding obligation, subjective rights in each case, both derive from the law of the land, in other words from objective law.

With reference to positive law, accordingly, international responsibility will have to be defined on the basis of the international juridical rule, which is its source, and not of the obligation, which is its consequence. What else is there to add? In the ordinary language that we use every day, we never talk of breach of an obligation, but rather of breach of a law or precept. We fulfil or fail to fulfil an obligation, and what we violate, break or breach is a rule or a commandment.

The great jurists have always used this kind of language when dealing with the issue of the responsibility of the State. Karl Strupp, one of the greatest theoreticians of the subject, defines it as follows:

> "The international delict consists of the action of a State which, in its relations with another State, violates a conventional or customary rule of international public law in force between the offending State and the injured State." 23/

We could go on quoting examples indefinitely, but one more will suffice, taken from the incomparable Accioly, who defines an unlawful act as the "breach of an international juridical rule", with of course the other two elements, namely attributability to the State and injury to the rights of others. 24/

How was it that such a long-standing and sound lexicologial tradition came to be abandoned in the International Law Commission in favour of the text that we have before us today?

From what we can read in the reports of the Special Rapporteur, the Commission, certainly by a majority, opted for the use of "obligation" rather than "rule" on the grounds that, as the Special Rapporteur says, "an obligation does not necessarily and in all cases flow from a rule in the true sense of the term, it may very well have been created by a legal instrument or by a decision of a judicial or arbitral tribunal. 25/ These words reflect a confusion between general rules and particular or individual rules.

Article 17. Irrelevance of the origin of the international obligation breached

> "1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of that obligation.
>
> "2. The origin of the international obligation breached by a State does not affect the international responsibility arising from the internationally wrongful act of that State."

Although the Special Rapporteur did not refer to the question of the sources of international law applicable to State responsibility, the Commission by general agreement, included at least two, treaty law and customary law, the most indisputable sources, in the first paragraph of article 17.

It might perhaps have been best to reproduce here the full text of article 38 of the Statute of the International Court of Justice, which states:

> "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provision of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> "2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto."

The reason for the insertion proposed above is that, as generally believed, article 38 constitutes the most authoritative statement concerning the sources of the international law currently in force, and not only, as is obvious, for purposes of its application by the International Court of Justice, but also in any other forum where the question may arise.

Why was this not done? Why, in the place where the general principles of law could logically be mentioned, after customary law and conventional law, was it merely stated that the obligation could be of "other" origin, thereby leaving it wide open to arbitrary interpretation?

The only explanation that fits the bill is that by making no reference to general principles, it was hoped that staunch positivists, like Strupp and Anzilotti, for whom any mention of general principles of law amounted to a return to the despised natural law, would be satisfied. "The rejection of natural law", wrote Giorgio del Vecchio, "is still generally regarded as an essential act of faith and almost a bounden duty for a lawyer". 26/

However, there is no reason for concern or for alarm, because natural law does not in any way mean the reintroduction of God, the most undesirable host in the inn of legal knowledge. Without a doubt, natural law had a theological pedigree in the writings of Saint Thomas Aquinas, but that was not the case either before or after the Neapolitan saint. It was not the case earlier, when Cicero's recta ratio or naturalis ratio had no connection at all with the gods of Olympus, or afterwards, in our day and age, when Guido Fasso, above all, has devoted so many books to la legge della ragione, the law of reason pure and simple, autonomous reason completely independent of theology. In almost all the codes of the Western world, and in the absence of specific law, disputes of a civil nature are decided on the basis of the general principles of law.

Article 18. Requirement that the international obligation be in force for the State

"1. An act of the State which is not in conformity with what is required of it by an international obligation constitutes a breach of that obligation only if the act was performed at the time when the obligation was in force for that State.

"2. However, an act of the State which, at the time when it was performed, was not in conformity with what was required of it by an international obligation in force for that State, ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory norm of general international law.

"3. If an act of the State which is not in conformity with what is required of it by an international obligation has a continuing character, there is a breach of that obligation only in respect of the period during which the act continues while the obligation is in force for that State.

"4. If an act of the State which is not in conformity with what is required of it by an international obligation is composed of a series of actions or omissions in respect of separate cases, there is a breach of that obligation if such an act may be considered to be constituted by the actions or omissions occurring within the period during which the obligation is in force for that State.

"5. If an act of the State which is not in conformity with what is required of it by an international obligation is a complex act constituted by actions or omissions by the same or different organs of the State in respect of the same case, there is a breach of that obligation if the complex act not in conformity with it begins with an action or omission occurring within the period during which the obligation is in force for that State, even if that act is completed after that period."

Like everything else in this world, human acts are situated within the coordinates of time and space. Familiar legal maxims like locus regit actum and tempus regit factum are indicative of this situation, and, in this codification exercise, there had to be an article specifying the relationship of the legal rule with time, and the breach of that rule which gives rise to State responsibility. The intersection of the two time periods, that of the rule and that of its breach, gives rise to a complicated structure, as is evident from the length of the article in question. Its heading, first of all, is one of the most convoluted imaginable and is expressed in the worst possible Spanish, measured by a selective yardstick of deformities. With better wording and greater concision, the Special Rapporteur had entitled it "Force of an international obligation", because that is what the article is about.

On looking into the body of the article, in corpore articuli, as the ancients put it, we find, that in an equally convoluted manner, paragraph 1 states the principle that the wrongfulness or otherwise of an act of the State must always be appreciated in the light of the law in force at the time. All of this would appear to be common sense, but as there will always be a lawyer to challenge such common sense, it will not be out of place to recall that the most authoritative and universally accepted statement of the principle was by the arbitrator Max Huber in the famous Island of Palmas case between the Netherlands and the United States of America. He said:

"Both parties are also agreed that a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time a dispute in regard to it arises or falls to be settled."

Despite its execrable wording, the article under discussion is among those with the soundest basis in law to be found in the International Law Commission's draft. The Special Rapporteur stressed its relevance in one of his reports:

"In affirming or denying the existence of State responsibility, reference has always been made to an international obligation in force at the time when the act or omission of the State took place ... De jure condito we may say that there is not, to our knowledge, a single case in which, on the strength of some customary general rule laid down after the event, a State has been held responsible for an act that was not internationally wrongful at the time when it was committed." 27/

That is why paragraph 2 of the article under discussion is difficult to understand. Indeed, it is not intelligible how the survival of a peremptory norm of general international law (jus cogens) by virtue of which a specific act which until that time was wrongful ceases to be wrongful - and, indeed, becomes obligatory - it is not intelligible, I repeat, how the retroactive effects of such a change can strip of their wrongfulness acts which were wrongful at the time of their commission. In line with article 53 of the Vienna Convention on the Law of Treaties, the rule, juris cogentis comes into force when it is "accepted and recognized by the international community of States as a whole" and, like any other legal rule, provides only for the future and never for the past. As the Napoleonic Code tells us, la loi ne dispose que pour l'avenir; elle n'a point d'effet rétroactif.

It is difficult to find a single concrete case in history illustrative of the hypothetical case the article is talking about, that is to say, of a wrongful act that later becomes not only lawful but compulsory. On the other hand, history is replete with examples of the opposite case, when acts which were once lawful in line with positive law, such as slavery and the slave trade, become wrongful. Justification will have to be found for this paragraph before the future codification conference.

The other paragraphs of the article are easily intelligible although they make somewhat turgid reading. Indeed, they try to give concrete expression to the principle of correspondence in time between the act of a State and the juridical rule in relation to acts of a serial, continuing or non-continuing character, indicating at each phase the application of the general principle explained above.

Article 19. International crimes and international delicts

"1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

"2. An internationally wrongful act which results from the breach of a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.

"3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, inter alia, from:

"(a) A serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

"(b) A serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

"(c) A serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

"(d) A serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

"4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict."

By its content alone, this article shows that mankind's conscience has become attuned to the idea that a special place must be set aside for international crimes in addition to international delicts. Unlike delicts in criminal law, which are considered as criminal acts liable to a fine or imprisonment or to both, an international delict has always meant and still is understood to mean the breach by a State of rule of international law in force for it that prejudices the interests of another State. However, as a result of the Second World War and its legacy of attendant horrors, the need arose to call certain acts that were particularly monstrous not merely delicts but rather crimes. The new classification came into vogue with the allied tribunals of Nuremburg, Tokyo and Manila that were set up to try war criminals for crimes against peace, war crimes and crimes against humanity. The first two categories were, so to speak, ephemeral since they focused on the outbreak of the war and how soldiers behaved during the hostilities, while the third and permanent category is still very current. In its famous judgement on the Barcelona Traction, Light and Power Company case, the International Court of Justice stated, inter alia, the following:

"In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.

"Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."

The quotation has been absolutely necessary, as it was the Special Rapporteur's source of the acts that constitute international crimes listed in paragraph 2 of the article, namely aggression, neo-colonialism, slavery, genocide and apartheid. The International Law Commission's draft adds other acts referred to either implicitly or explicitly in the Stockholm Declaration on the Environment, such as massive pollution of the atmosphere or of the seas, to the above-mentioned acts.

The list is, of course, unobjectionable, although the practical purpose of classifying wrongful acts into international crimes and international delicts has yet to be considered. The Special Rapporteur is the most appropriate person who can speak on this issue:

> "There is no reason for making such classifications in the text of an international convention on State responsibility if they are only of theoretical value. For their inclusion to be justified they must constitute the basis of a normative distinction. It would be absurd [sic] to propose that a distinction should be made in this draft between different categories of internationally wrongful acts on the basis of the content of the obligation breached if this distinction does not involve the application of different régimes of international responsibility." 28/

It could not have been stated better; however, we could apply the well-known adage de te fabula narratur to the distinguished Special Rapporteur, since the draft does not apply the corresponding duality to the regime of penalties for the above-mentioned wrongful acts. Once again, there is not the slightest mention of this in the current draft.

Why did such an unfortunate oversight occur? On the face of it, it would seem that the Special Rapporteur simply lack the courage to point out that the only real difference between the two types of punishment for wrongful acts is imprisonment in the case of international crimes. The Special Rapporteur could and should have mentioned all this and could hence have laid the foundations, on the basis of positive law, for the treatment of war criminals in the third world war. So far, the sentences of the Nuremberg, Tokyo and Manila international tribunals have been based in their entirety on natural law since until that time war and the conduct of war were acts that fell wholly under the jurisdiction of each individual State. In order to ensure that in future those who commit such horrendous crimes and their accomplices can be punished on the basis of positive law through imprisonment, a provision in this regard should be inserted as of now in the relevant instruments. As the Special Rapporteur omitted this important aspect, his classification of wrongful acts into delicts and crimes will, for the time being, remain nothing more than an academic exercise.

Article 20. Breach of an international obligation requiring the adoption of a particular course of conduct

> "There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation."

On the text itself, no comment is required. Its application relates above all to administrative or legislative measures that may be taken by a State under various circumstances, such as those imposed on Austria, in order to eliminate the vestiges of nazism, in the State treaty restoring it to international life.

Article 21. Breach of an international obligation requiring the achievement of a specific result

> "1. There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specific result if, by the conduct adopted, the State does not achieve the result required of it by that obligation.
>
> "2. When the conduct of the State has created a situation not in conformity with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the State also fails by its subsequent conduct to achieve the result required of it by that obligation."

According to the Special Rapporteur, this article specifies something completely different from what is provided for in the article that immediately precedes it. That may very well be, but the fact is that the sole apparent difference is that the first article stipulates a particular course of conduct on the part of the State, and the second a particular result, while leaving it to the State to select the means. In both cases, accordingly, there is an obligation to act, and accordingly there is no essential difference between the two situations. Thus, for example, the Vienna Convention on diplomatic relations specifies that the receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity, and also to prevent any attack on the person, freedom and dignity of a diplomatic agent. Whatever the Special Rapporteur may say to the contrary, is this not also an obligation to take action, and not in general terms, but action with a precise and clearly specified content?

Article 22. Exhaustion of local remedies

> "When the conduct of a State has created a situation not in conformity with the result required of it by an international obligation concerning the treatment to be accorded to aliens, whether natural or

juridical persons, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the aliens concerned have exhausted the effective local remedies available to them without obtaining the treatment called for by the obligation or, where that is not possible, an equivalent treatment."

The rule to which reference is made here, that of exhaustion of local remedies as an essential prelude to any international claim, is one of the strongest in this field. The International Court of Justice, in the Interhandel case, took an unequivocal position in this respect, in its assertion that:

"The rule that local remedies must be exhausted ... is a well-established rule of customary international law."

In turn, in a regional forum, the decision (1930) handed down by the Joint Claims Commission between Mexico and the United Kingdom in the Mexican Union Railway case described it as "one of the recognized rules of international law".

For all that, despite its virtually universal acceptance, discussion continues until today as to whether the conditio sine qua non of exhaustion of local remedies serves this function in relation to the generation of the offending State's responsibility, or simply to the activation of that responsibility by the State making the claim. Needless to say, the countries of the third world favour the first interpretation, and the capitalist countries the second. The controversy is up to a point Byzantine in the view of some, but it is not superfluous to recall that in the Mexican Union Railway case referred to above, the Joint Commission stated unequivocally that the responsibility of the State under international law can only comme[illegible] when the persons concerned have availed themselves of all remedies open to them under the national laws of the State in question.

There is still a curious joint opinion (Norway-United States) whose authors, while in general they embrace the capitalist exegesis, nevertheless make an exception in the case of déni de justice, in which the ruling of the court of last appeal has to be awaited in order to be able to say that the State responsible has committed a denial of justice. This opinion was put forward by its authors at the 1930 Codification Conference, which adopted the following manifestly eclectic formula:

"The State's international responsibility may not be invoked (mise en jeu) as regards reparation for damage sustained by a foreigner until after exhaustion of the remedies available to the injured person under the municipal law of the State."

The capitalists and the third-worlders took over this deliberately ambiguous formula, each faction in support of its own thesis, although as is readily apparent it lends itself rather more to the capitalist

interpretation. To the extent that an opinion may be ventured on this matter, expressions such as mettre en jeu, mettre en oeuvre, mettre en scène assume something which is in some way pre-existent, the last of them, for example, the dramatic work. The ILC draft, lastly, would appear to incorporate the third world thesis, since in stating that "there is a breach of the obligation only if the aliens concerned have exhausted the ... local remedies", it makes it sufficiently clear that only from this moment on, once the aforesaid exhaustion has taken place, is the responsibility of the State which is at fault generated.

Moreover, the question is very far from being, as some hold it to be, purely theoretical or academic. On the contrary, very serious practical consequences may ensue depending on which version of the exact time at which the internationally unlawful act was perpetrated is adopted, in that it is from that moment, the tempus commissi delicti, that the obligation starts to make reparation - naturally with interest - for the damage caused, all of which may take years before the claim can be activated. This matter will thus need to be looked into very carefully in order that a firm position can be taken at the future codification conference.

Article 23. Breach of an international obligation to prevent a given event

> "When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result."

This article is a perfect truism, in that it repeats the same thing in the same words, and is moreover perfectly pointless, since all it does is to express in passive form what was already expressed actively in article 21 of the draft. In both, reference is made to the typical (this is the Special Rapporteur's word) case of the obligation on the receiving State to provide the diplomatic or consular mission with the protection required to ensure that its freedom and dignity are respected, and similarly with respect to the person of the diplomatic agent, except that article 21 speaks of obtaining this result with the contrary and inevitable consequences. Sheer tautology, in the final analysis, piétiner sur place as the French say, or nuestro danzón sin salir del cuadrito, to use a Mexican expression. The last articles of the ILC draft are full of this repetitive casuistry.

Article 24. Moment and duration of the breach of an international obligation by an act of the State not extending in time

> "The breach of an international obligation by an act of the State not extending in time occurs at the moment when that act is performed. The time of commission of the breach does not extend beyond that moment, even if the effects of the act of the State continue subsequently."

In this and subsequent articles, the Commission's draft attempts to resolve the problem of the various time factors in the breach of a rule of

international law that may engage the responsibility of the State. This article deals with the acts termed instantaneous, as distinct from the continuing acts dealt with in the next article. Where the former are concerned, it is made clear that their instantaneous nature is not lost by virtue of the fact that their effects may extend over time, like the convalescence of an injured victim of aggression.

Article 25. Moment and duration of the breach of an international obligation by an act of the State extending in time

"1. The breach of an international obligation by an act of the State having a continuing character occurs at the moment when that act begins. Nevertheless, the time of commission of the breach extends over the entire period during which the act continues and remains not in conformity with the international obligation.

"2. The breach of an international obligation by an act of the State, composed of a series of actions or omissions in respect of separate cases, occurs at the moment when that action or omission of the series is accomplished which establishes the existence of the composite act. Nevertheless, the time of commission of the breach extends over the entire period from the first of the actions or omissions constituting the composite act not in conformity with the international obligation and so long as such actions or omissions are repeated.

"3. The breach of an international obligation by a complex act of the State, consisting of a succession of actions by the same or different organs of the State in respect of the same case, occurs at the moment when the last constituent element of that complex act is accomplished. Nevertheless, the time of commission of the breach extends over the entire period between the action or omission which initiated the breach and that which completed it."

The article is perfectly clear, especially after all the explanations given beforehand. No further comment is called for.

Article 27. Aid or assistance by a State to another State for the Commission of an internationally wrongful act

"Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation."

With this article, we come to a new chapter in the ILC draft, and one which certainly merits the closest attention, the chapter which deals with the implication of a State in the internationally wrongful act of another State.

Starting with the heading which precedes the text of the article, which is not without importance here, we have to note that whereas in the current wording the reference is to aid or assistance by a State to another State, to eminently positive acts, the Special Rapporteur's draft was generally referred to complicity: complicité d'un Etat dans le fait internationalement illicite d'un autre Etat. That text was much broader in scope, covering as it did not only positive acts but also negative ones, such as silence, inaction or tolerance towards the commission of a crime which could perfectly well have been prevented by the inactive agent.

All of which leads us, as if by the hand, to consider the specific circumstances in which it may be possible to speak of aid or assistance by a State to another State in the commission of an internationally wrongful act. The express circumstances may, of course, be infinitely varied, but the typical case at the present time seems to be well stated in the list of acts of aggression contained in the definition of aggression approved by the General Assembly in 1974, namely:

> "the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State".

More concretely, the subject here is the North American military bases scattered throughout the world within the framework of NATO. This is the typical case, once again, and the contentious case, already referred to above, was that of the historic note by the Government of the USSR (26 July 1958) addressed to the Government of the Federal Republic of Germany, accusing it of participation in North American aggression by allowing United States aircraft to take off from German territory to bomb the territory of Lebanon against all reason and without the least right. In reply to this note, after dwelling at length on the intrinsic merits of the case, which for the time being do not concern us, the Federal Government concluded by saying that it would never permit the territory of the Bundesrepublik to be used for the commission of acts of aggression. Although disagreeing with the Soviet Government in its assessment of the facts, the Federal German Government was in agreement with it regarding the interpretation of the law.

Article 28. Responsibility of a State for an internationally wrongful act of another State

> "1. An internationally wrongful act committed by a State in a field of activity in which that State is subject to the power of direction or control of another State entails the international responsibility of that other State.
>
> "2. An internationally wrongful act committed by a State as the result of coercion exerted by another State to secure the commission of that act entails the international responsibility of that other State.

"3. Paragraphs 1 and 2 are without prejudice to the international responsibility, under the other articles of the present draft, of the State which has committed the internationally wrongful act."

Article 27, as we have seen, described, apart from the responsibility of the direct author of the internationally wrongful act, a subsequent responsibility on the part of another State which has in some way contributed to the commission of that act. In the present article, on the other hand, we are dealing with the responsibility assumed by a State for another's act, that is to say, for an act committed by another State which is in some way under the control of or dependent on the first. Under these circumstances, it is perfectly natural that the dominant State should be responsible for the acts of the dependent State.

The usual examples of situations of this kind given in the literature are those of a State which is a member of a federal State, a protectorate, the former Mandates of the League of Nations and Trust Territories. Now that both the protectorates and, with the independence of Namibia, what was left of the South West Africa Mandate have been terminated, and that the remaining Trust Territories, lost in the Pacific, can be counted on the fingers of one hand, the only contemporary situation would be that of the federal State.

The situation of the puppet State, as in the case of Manchukuo, is still irregular, or innominate, whichever term we may prefer.

Circumstances precluding responsibility

Article 29. Consent

"1. The consent validly given by a State to the commission by another State of a specified act not in conformity with an obligation of the latter State towards the former State precludes the wrongfulness of the act in relation to that State to the extent that the act remains within the limits of that consent.

"2. Paragraph 1 does not apply if the obligation arises out of a peremptory norm of general international law. For the purposes of the present draft articles, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

The heading used here for this new section is the one that appears in all our penal codes, and not "precluding wrongfulness", as it reads in the ILC draft, inasmuch as the former term relates to the subject, that is to say the State (like man in penal law) and the second to the fact, which only becomes unlawful because of the act of a human subject. With regard to the consent of the affected party as a precluding factor, nothing is more clear or more valid than the scienti et volenti non fit injuria which comes to us from Roman law and is as obvious today as it was then.

The essence of the matter, nevertheless, lies in knowing whether the consent was given freely or under duress, in which case, in the general view, it is valueless. And in all the historical cases adduced for this purpose, the consent was vitiated by duress, starting with the Austrian Anschluss (11 March 1938), to achieve which Germany brought strong pressure to bear on Austria to appoint to the highest posts the fifth columnists who until then had been under cover, whereupon they were able to extend a jubilant welcome to Hitler's armies. A similar situation was the indefinite stationing of British and North American troops in Greece in 1946, on the pretext of having been invited by the Hellenic Government. Another case, lastly, to mention only the most conspicuous, was that of the Prague spring (1968), when the new ad hoc government consented to the entry of Soviet forces into Czechoslovak territory. Free consent, then, is for the time being an extreme, and to date hypothetical, situation.

When, on the other hand, a peremptory norm of general international law, in the wording of paragraph 2 of the article under consideration, is involved, there can be no agreement of any kind between the intervening State and that in which the intervention is made, since it is characteristic of these norms that no derogation from them is permitted in conformity with article 53 of the Vienna Convention on the Law of Treaties.

Article 30. Countermeasures in respect of an internationally wrongful act

> "The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State."

Now that the institution of reprisals, along with the law of war, has been abolished under the terms of Article 2.4 of the United Nations Charter, it is difficult to see what is the intended subject of this article, which in its deliberate vagueness extends to everything, unless it be the high-handed measures embodied in articles 106 and 107 of the San Francisco Charter itself. They are referred to in its text as transitional and they remain in force until today. They authorize the five permanent members of the Security Council to take, by any means and in all parts of the world, "as if that document [the Charter] did not exist" (Goodrich, Hambro and Simons), "such joint action ... as may be necessary for the purpose of maintaining international peace and security." Added to this is the provision of article 107 which authorizes the same complete freedom of action against the States defeated in the Second World War by those that won it.

It was in vain that many delegations at the San Francisco Conference put forward objections to these texts, among them the Mexican delegation, which argued that, through the inclusion of these provisions, the new Charter would suffer from the same original sin as the Covenant of the League, because of the latter's connection with the Treaty of Versailles. In the view of the representative of Mexico, the provisions in question should at most be

consigned to a special protocol, but should never be incorporated in the Charter. As recorded by Goodrich, Hambro and Simons, "Opposition to the Mexican proposal came primarily from France and the Soviet Union, who, for understandable reasons, were especially concerned to prevent any reemergence of German aggressive power".

Article 31. Force majeure and fortuitous event

> "1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.
>
> "2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility."

In adopting this text, and following the guidance given by the Special Rapporteur, the International Law Commission presents force majeure and fortuitous event as practically synonymous, distinguishing between them, if at all, judging from the last words of the first paragrapn, by the fact that in the first case, that of force majeure, the subject agent is aware of the phenomenon, whereas this is not so in the second case, that of the fortuitous event.

Such was indeed the strange criterion adopted by the Special Rapporteur, who illustrates it copiously with the case of the pilot of an aircraft who is compelled to enter foreign airspace because of bad weather, deviation from the route or mechanical problems, the only difference being that in some cases he is, and in others is not, aware of what is happening. Where can the Special Rapporteur have found this surprising criterion for distinguishing between force majeure and fortuitous event? Ignoramus et ignorabimus.

Failing a better criterion, it would appear that the most prudent course is to be guided by the students of civil law, instead of making an ostentatious display of originality, since it is from civil law that we have received these concepts, and accordingly all we have to do is adjust them to the special scope of our discipline.

The Civil Code for the Mexican Federal District, to take that first, appears to regard fortuitous event and force majeure as synonymous, in that it refers only to the former in article 3111:

> "No one is under an obligation in the case of a fortuitous event except when he has caused or contributed to it, when he has expressly accepted this responsibility or when it is imposed on him by law."

As regards the students of civil law, let us turn to the best of them all, the incomparable Marcel Planiol, from whom we shall confine ourselves to copying the following lines:

"In order for the debtor to be discharged, even though the obligation remains unexecuted, two conditions are necessary:

"(1) the happening of the event must be due to a 'foreign cause, which can not be imputed to him,' ...;

"(2) the obstacle resulting from the foreign cause must be insurmountable, for if the debtor can still discharge the obligation, even at a sacrifice, ... his creditor preserves the right to exact performance ...;

"A logical distinction should thus be made between the two expressions: the expression 'fortuitous event' should be used to designate the external origin of the obstacle which prevents the execution of the obligation ...; on the other hand the expression 'irresistible force' should be used to indicate the insurmountable nature of the obstacle ... In that way the two expressions are justified because they express two different ideas. They can thus be employed cumulatively in connection with the same fact, which could be at the same time foreign in its origin and of superior force in its result; or separately, if one or the other only of these two characteristics are discussed." 29/

Article 32. Distress

"1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the conduct which constitutes the act of that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care.

"2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of extreme distress or if the conduct in question was likely to create a comparable or greater peril."

At first sight, the need for this new clause excluding responsibility is not apparent: it could perfectly well be reduced to force majeure. We are back with the pilot in difficulties et sic de ceteris.

Article 33. State of necessity

"1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

"(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

"(b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

"2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

"(a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

"(b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

"(c) if the State in question has contributed to the occurrence of the state of necessity."

In the introduction, an extensive explanation was given, with copious documentation, of the position that there can be no room for the state, or right, of necessity, which gives carte blanche to the most arbitrary of actions. The best thing would be for it not to appear at all in any instrument dealing with the international responsibility of the State.

Article 34. Self-defence

"The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations."

I have placed on record elsewhere the many difficulties that have arisen in connection with Article 51 of the United Nations Charter, to which the ILC draft simply refers.

Article 35. Reservation as to compensation for damage

"Preclusion of the wrongfulness of an act of a State by virtue of the provisions of articles 29, 31, 32 or 33 does not prejudge any question that may arise in regard to compensation for damage caused by that act."

Although at first sight it does not appear very logical that someone who has not committed a wrongful act should be held responsible for damage caused by that act, the Commission considered, rather, that circumstances may exist in which, for reasons of equity, such responsibility can indeed be justified. The Commission took this view in particular in relation to the state of necessity, in which, for example, even had Germany been victorious in the First World War, it would have had to compensate Belgium and Luxembourg for the damage caused in their territory by the German troops' invasion, even on the assumption that that operation was justified by reasons of necessity. Each case, for the rest, will have to be judged in the light of its own merits and characteristics.

On coming to the end of the first part of the draft codification of the international responsibility of the State for wrongful acts, and before proceeding further, let us reflect a little on the overall structure of the draft and its gradual development, as it emerges from the official documents.

With regard to the general plan approved by the Commission, the origin of international responsibility is the subject of Part 1 of the draft, which is concerned with determining on what grounds and under what circumstances a State may be held to have committed an international wrongful act which, as such, is a source of international responsibility. Part 2 will deal with content, forms and degrees of international responsibility, that is to say, with determining the consequences which an internationally wrongful act of a State may have under international law in difference cases (reparative and punitive consequences of an internationally wrongful act, relationship between these two types of consequences, material forms which reparation and sanction may take). Once these two essential tasks are completed, the Commission may perhaps decide to add to the draft a Part 3 concerning the "implementation" of international responsibility and the settlement of disputes.

As may be seen, Parts 2 and 3 of the project are purely adjective or ancillary, whichever term we may prefer, in comparison with Part 1, which contains the real doctrinal core of the international responsibility of the State codified in the articles reproduced and extensively commented on above. It also appears to emerge from the official documents that Part 1 is apparently definitively concluded, in other words closed (or is there any difference between conclusion and closure?) to any further development or improvement. And yet, as will have been apparent from everthing that has been said above, the current draft is still open to improvement in terms both of what is included and of what is not included, that is to say what it leaves out.

Regarding what is included, with the exception of certain undeniably good points the draft is, in its first part, a collection of analytical judgements or empty formalities, lacking the slightest contact with international reality. Whatever the Special Rapporteur may say, it moves not on the inductive and empirical plane, but on the deductive plane of pure reason.

As to what is not included, the draft leaves out once and for all the extremely important topic, the most important in any event for the third world countries, of diplomatic protection and the status of aliens. Yet this is the very subject that was fully ripe for codification, with an extremely rich literature derived from the joint claims commissions, especially in Mexico and Venezuela, and since the Second World War in many African and Asian countries when colonialism was eliminated there. The first Special Rapporteur, Francisco García Amador, travelled this road very successfully, but unfortunately he was unable to complete his work.

What can be done to fill, if that is still possible, this unfortunate gap? Of course, no one individual will be able to do this, but the community of States can if, in due course, they insist on the draft being revised.

Notes

1/ Funck-Brentano and Sorel, Précis de droit des gens, Paris, 1887, pp. 224 et seq.

2/ Funck-Brentano and Sorel, op. cit., pp. 224-225.

3/ De pot. civ. 21.

4/ De iure belli ac pacis, II, 21, 2, 2.

5/ Manuel de DIP, 1908, n. 325.

6/ De iure belli ac pacis, II, 17, 20.

7/ Corso di diritto internazionale, 4a. ed., 1955, p. 408.

8/ Quoted in A. H. Feller, The Mexican Claims Commissions, p. 131.

9/ P. Reuter, DIP, PUF, 1973, p. 179.

10/ M. Planiol, Traité élémentaire de droit civil, t II, No. 871.

11/ Responsabilita dello stato nel diritto internazionale, Firenze, 1902, p. 89.

12/ Le délit international, p. 29, in Scritti sulla responsabilita internazionale degli stati, vol. I, 1979.

13/ La responsabilite internationale des Etats a raison des dommages soufferts par des étrangers, para. 5.

14/ Le délit international, in Scritti sulla responsabilita internazionale degli stati, p. 131.

15/ Traité de DIP, I, p. 420.

16/ Direito internacional público, 2nd ed. I, p. 351.

17/ DIP, transl. Truyol and Serra, p. 297.

18/ International law in the past third of a century, pp. 268-269.

19/ Le Droit des gens ou principes de la loi naturelle, II, p. 72.

20/ EJA. op. cit., pp. 283-284.

21/ Diplomatic protection of citizens abroad, p. 229.

22/ Borchard, op. cit., p. 239.

Notes (continued)

23/ Eléments de droit international public universel, européen.

24/ Tratado de direito internacional público, I, p. 275.

25/ Fifth report, para. 5.

26/ Los principios generales del derecho, Barcelona, 1933, p. 5.

27/ Fifth report, paras. 53-56.

28/ Fifth report, para. 79.

29/ Traité élémentaire de droit civil, II, 231.